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IN THE

Supreme Court of the United States

BACHRODT CHEVROLET CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
A. The Facts	3
B. The Decisions Below	4
REASONS FOR GRANTING THE WRIT	7
A. By Recognizing that the Board's Order was Supported by Ambiguous Evidence, the Court of Appeals Disregarded the *Burns* Requirement that Section 8(a)(5) Findings Such as This Must Be Premised on Evidence that is "Perfectly Clear."	7
B. The Court of Appeals Decision Presents An Important Question of Federal Law Because It Is Based on an Overly-Broad Construction of the Exception to the *Burns* Rule Which Conflicts with the Decision of Another Court of Appeals and with Other Board Decisions.	12
CONCLUSION	21
INDEX OF APPENDICES:	
APPENDIX A, Unpublished Order of the United States Court of Appeals for the Seventh Circuit in No. 73-2032 dated May 19, 1975	1a
APPENDIX B, Supplemental Decision and Order of the National Labor Relations Board in Case No. 38-CA-811 dated August 27, 1973	9a
APPENDIX C, Order of the United States Court of Appeals for the Seventh Circuit in No. 71-1354 dated May 8, 1973	17a

INDEX—Continued

Page

APPENDIX D, Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in No. 72-1075 dated April 2, 1973 ..... 19a

APPENDIX E, Order of the United States Court of Appeals for the Seventh Circuit denying a rehearing in No. 71-1354 dated November 9, 1972 ..... 20a

APPENDIX F, Opinion of the United States Court of Appeals for the Seventh Circuit in No. 71-1354 dated September 13, 1972 ..... 21a

APPENDIX G, Decision and Order of the National Labor Relations Board in Case No. 38-CA-811 dated December 3, 1970 ..... 41a

APPENDIX H, Statutes Involved 79a

TABLE OF AUTHORITIES

Cases: Page

Antia Shops, Inc., 211 NLRB No. 74 (decided June 12, 1974) 19

Boeing Co., 214 NLRB No. 32 (decided November 1, 1974) 20

Greengate Mall, Inc., 209 NLRB No. 2 (decided February 14, 1974) 19

N.L.R.B. v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972) 5-10, 12-19, 21

N.L.R.B. v. *Wayne Convalescent Center, Inc.*, 465 F.2d 1039 (6th Cir. 1972) 14

Spruce-Up Corporation, 209 NLRB No. 19 (decided February 28, 1974) 18-21

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)

Sections 8(a)(1) 4

8(5) 2, 4, 5, 7

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Bachrodt Chevrolet Co., prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Seventh Circuit entered on May 19, 1975, holding that Petitioner's unilateral alteration in the working conditions of its employees constituted an unfair labor practice.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, Pet. App. 1a-8a) is an unpublished order and has not been reported. The supplemental decision of the Board on remand is reported at 205 NLRB 784 (Appendix B, Pet. App. 9a-16a). The order of the court of appeals remanding the case to the Board

is reported at —— F.2d ——, 83 LRRM 2528 (Appendix C, Pet. App. 17a-18a). The opinion of this Court remanding the initial decision of the court of appeals is reported at 411 U.S. 912 (Appendix D, Pet. App. 19a). The initial opinion of the court of appeals is reported at 468 F.2d 963 (Appendix F, Pet. App. 21a-40a). The initial decision of the Board and Trial Examiner are reported at 186 NLRB 1035 (Appendix G, Pet. App. 41a-78a).

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1975. No petition for rehearing of that judgment was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals misapplied the applicable legal standard set forth in this Court's decision in *N.L.R.B.* v. *Burns International Security Services, Inc.*, when it found on a record limited to facts developed prior to the *Burns* decision, that Bachrodt, a successor employer, had hired the existing unit employees prior to announcing its initial terms of employment, and violated Section 8(a)(5) by adopting wages and other terms and conditions of employment which differed from those of the predecessor employer.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519,

29 U.S.C. 151, *et seq.*), are set forth in Appendix H (Pet. App. 79a-80a).

STATEMENT OF THE CASE

A. The Facts

Bachrodt Chevrolet Co. (herein "Bachrodt") entered into a Buy and Sell Agreement on October 28, 1969 (all dates refer to 1969) with Zimmerman, operator of a Chevrolet franchise at Freeport, Illinois, under the terms of which Bachrodt purchased some of the assets of Zimmerman. (O.A. 171).[1] Zimmerman was a party to a collective bargaining agreement covering service employees with the Union,[2] which agreement Bachrodt specifically did not assume. (O.A. 158-168, 184).

Bachrodt's takeover of Zimmerman's assets was effective Monday, November 10. On Friday, November 7, Bachrodt handed out applications for employment to Zimmerman's employees. (O.A. 81, 82, 143, 155, 156). On Monday, November 10, Bachrodt held a meeting of the employees, explained in what manner the employment terms of Bachrodt's operation would differ from Zimmerman's and also interviewed the employees. (O.A. 119-120). Bachrodt did not hire any of Zimmerman's employees until after he be-

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[1] "O.A." references are to the Original Appendix filed in the court of appeals when this case was initially before that court in No. 71-1354. "A." references are to the supplemental appendix filed in the court of appeals on remand in No. 73-2032. The Original Appendix contains the underlying evidence which was before the Board in both the original and supplemental proceedings herein.

[2] International Association of Machinists Local 1096.

came the owner of the business on Monday, November 10, and until after the interviews. After the employee meeting and the individual interviews were completed, a majority of Zimmerman's employees then went to work for Bachrodt. Zimmerman's body shop employees, however, were never employed by Bachrodt. (O.A. 194). In addition, two of Zimmerman's employees did not report for work on November 10. (O.A. 84).

On November 7, the Union sent a letter to Bachrodt (O.A. 195) advising that Zimmerman had an existing labor agreement with the Union and further setting forth the Union's position that the agreement was equally binding on Bachrodt as it was on Zimmerman. Bachrodt rejected the Union's demands. (O.A. 197) and the Union thereafter filed unfair labor practice charges alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (herein "the Act").

B. The Decisions Below

In its initial decision, the National Labor Relations Board (herein "the Board") held that Bachrodt was a successor to Zimmerman; that Bachrodt had violated Section 8(a)(5) and (1) of the Act by unilaterally changing some conditions of employment and refusing to honor Zimmerman's collective bargaining agreement with the Union (Pet. App. 42a-43a, 61a-72a). The Board originally ordered Bachrodt to bargain with the Union, honor the existing contract, and make restitution for any benefits which may have been unlawfully withheld from employees because of Bachrodt's failure to abide by the existing

contract, and further for any benefits lost because of the unilateral changes (Pet. App. 72a-76a). There was no finding that Bachrodt had planned to retain all the employees in the unit prior to setting its initial employment terms.

Thereafter, in Case No. 71-1354, the Board applied to the court of appeals for enforcement of its order. The court ordered that the decision in the case be held in abeyance to await this Court's decision in *Burns International Security Services, Inc.* v. *N.L.R.B.*, which was subsequently decided in 406 U.S. 272. After the issuance of *Burns*, the court of appeals held that while Bachrodt was a successor employer, it was not bound by Zimmerman's contract with the Union (Pet. App. 29a-30a). However, the court held that Bachrodt violated Section 8(a)(5) by making unilateral changes in working conditions of employees (Pet. App. 30a-33a). Judge Stevens dissented for several reasons (Pet. App. 33a-40a) including his determination that he had doubts that it was "perfectly clear" that Bachrodt had planned to retain all of the employees in the unit prior to instituting its own conditions of employment (Pet. App. 37a-38a).

Bachrodt thereafter filed a petition for a writ of certiorari to the court of appeals with this Court (No. 72-1075) in which it argued that Bachrodt's setting of initial employment terms did not violate Section 8(a)(5) because there were not sufficient facts in the record to fulfill the requirement under *Burns* that such a violation would only occur in the exceptional circumstance "in which it is perfectly clear that the new employer plans to retain all employees in the unit" (406 U.S. at 294-295)

prior to his setting his initial terms and conditions of employment (No. 72-1075, pet. cert. at p. 7). On April 2, 1973, this Court granted Bachrodt's petition in the following language (Pet. App. 19a):

> The petition for certiorari is granted, the judgment is vacated, and the case is remanded to the Court of Appeals with instructions to remand the case to the National Labor Relations Board for such further proceedings as may be appropriate, in light of *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 245-250 (1972); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

The court of appeals, on May 8, 1973, remanded the case to the Board "for such further proceedings as may be appropriate in light of [*Burns*] . . ." (Pet. App. 17a-18a).

On remand, the Board requested the General Counsel and Bachrodt to submit statements of position. On August 27, 1973, the Board, without benefit of any further hearing or the taking of any further evidence, issued its Supplemental Decision and Order (Pet. App. 9a-16a) in which it rescinded its finding that Bachrodt was required to abide by its predecessor's collective bargaining agreement with the Union (Pet. App. 11a). The Board further concluded that there was "sufficient" evidence to warrant a finding that at the time Bachrodt announced and instituted the unilateral changes on November 10, it had hired its full complement of employees (Pet. App. 12a). The Board then held that Bachrodt had an obligation to bargain with the Union about its initial changes in the terms of employment, and had violated Sec-

tion 8(a)(5) by its failure to do so (Pet. App. 12a-14a).

The Board applied to the court of appeals for enforcement of its supplemental order. The court of appeals enforced the Board's order in an unpublished opinion (Pet. App. 1a-8a), holding that the evidence could be fairly interpreted to show that the employee interviews had been completed before the employees appeared for work on Monday, November 10, and prior to the announcement that conditions of employment would be different in certain respects. However, as we show below, the court of appeals also expressed certain reservations about the evidence thereby demonstrating that it had failed to follow the mandate of *Burns* that such a finding of a Section 8(a)(5) violation must be based upon evidence that is "perfectly clear."

REASONS FOR GRANTING THE WRIT

The court of appeals order enforcing the Board's supplemental order on remand in this case is contrary to the decision of this Court in *Burns International Security Services, Inc.* v. *N.L.R.B.*, 406 U.S. 272 (1972).

A. By Recognizing that the Board's Order was Supported by Ambiguous Evidence, the Court of Appeals Disregarded the *Burns* Requirement that Section 8(a)(5) Findings Such as This Must Be Premised on Evidence that is "Perfectly Clear."

This Court in *Burns* held that a successor may establish the initial basis on which it will hire the predecessor's employees without consulting their union representatives and without committing an unfair labor practice.

Burns further went on to say (pp. 294-295):

> "Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is *perfectly clear* that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the union as required by § 9(a) of the Act, 29 U.S.C. § 159(a)." (Emphasis added).

Thus, it is plainly evident from *Burns* that unless the General Counsel presents evidence which makes it "perfectly clear" that the new employer plans to retain all of the employees in the bargaining unit, that employer may set its initial terms and conditions of employment without consultation with the employees' existing collective bargaining representative. Absent such clear evidence, the employer commits no unfair labor practice in making unilateral initial changes in employment terms.

The court of appeals, however, ignored this evidentiary standard set forth in *Burns* and enforced the Board's order based upon evidence which, even the court implicitly recognized, was substantially lacking in clarity. Thus, the court of appeals twice complained that the record was compiled before *Burns* was handed down and that the evidence therein

suffered as a result. The court stated (Pet. App. 2a):

> The Board [in its first decision] did not then have the benefit of the Supreme Court decision in [*Burns*]. The parties doubtless would have more specifically pursued at the hearing the factual inquiries which became more significant by reason of *Burns*.

and likewise (Pet. App. 7a):

> As already indicated, counsel would undoubtedly, if they had had *Burns* before them, have asked more pointedly about the sequence of interview, Monday morning opening, and announcement of changes.

In recognizing that the evidence before the Board was less than clear, the court stated that it did not fault the Board for attempting to resolve the issue on the evidence before it, because there had been no representation by Bachrodt as to what further testimony would be presented at another hearing (Pet. App. 7a).

From such comment, it is evident that the court improperly placed the burden on Bachrodt to prove that it did not plan to retain the employees rather than requiring the General Counsel to meet his burden of proving that it was "perfectly clear" that Bachrodt planned to do so. But a fair reading of this Court's remand would indicate that if the existing evidence was ambiguous, and the General Counsel was unable to clarify it, then the charge against Bachrodt should have been dismissed. Moreover, although it was not required of it, Bachrodt did urge, in its statement of position to the Board on remand,

that if there were any doubt that the facts of this case placed it outside the exception noted in *Burns*, then there should be a further hearing (Pet. App. 3a; A. 46).[3]

In addition to these general comments on the state of the evidence, the court of appeals also expressed its doubt that the sequence of events as found by the Board in this case was strongly supported by the record. Thus, while the court agreed with the Board that Bachrodt had completed its interviews and hiring prior to its announcement of changes in working conditions, it also pointed to significant contrary evidence that would have supported the conclusion that the hiring had not been so completed. The court noted that Mr. Bachrodt's testimony "is susceptible of the interpretation that the interviews and hiring took place on Monday" (Pet. App. 6a).[4]

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[3] As in its initial petition for certiorari (pet. cert. p. 7), Bachrodt pointed out the deficiencies in the record to the Board in its statement of position. Thus, Bachrodt explained that before closing the purchase of Zimmerman's assets on Monday, November 10, it had made absolutely no commitment to either Zimmerman or Zimmerman's employees that it would hire or retain them. Bachrodt's new terms were explained to the employees on Monday, but it did not know which employees it would hire until after the Monday interviews (A. 46). By thus indicating the deficiencies in the record, Bachrodt obviously was also expounding the type of evidence it would develop in a post-*Burns* hearing.

[4] The evidence, as set forth by the court (Pet. App. 6a, n. 3) indicated the following:

> "Q When Bachrodt Chevrolet took over on *November 10th*, what if anything did you do with regard to the men who had worked for Zimmerman with re-

The court also indicated that testimony of employee Bocker could be interpreted as putting his interview on Monday, November 10, and not on some previous day (Pet. App. 6a).[5]

In spite of these misgivings about the testimony of Bachrodt and Bocker, the court of appeals found

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gard to taking applications or anything else? *Just tell us what you did that day.* (Emphasis added).

"A [Bachrodt] Before took the place over we handed out applications to everybody. They were filled out and turned back in to us, and at that time we looked over each and then each man was interviewed. We decided whether to hire them, or they could make a decision on whether they wanted to work for me."

[5] The court set forth Bocker's testimony as follows (Pet. App. 6a, n. 4):

"Trial Examiner: When these items were changed on November 10th—Incidentally, were you told about the holiday change back on November 10th?

"The Witness: I believe I was, because I went in for an interview with Mr. Bachrodt and he told me what our new pay schedule would be and what the holidays would be and so forth.

"Trial Examiner: Do you know whether others were told on November 10th?

"The Witness: We had a group meeting in the rear service room, and there were items covered then. I can't recall exactly what they were.

"Trial Examiner: Were they the new conditions you were working under?

"The Witness: Many of them, yes."

Thus, if Bocker had been interviewed on November 10th, it is evident that there has been no showing that when Bachrodt took over the business on November 10, he had, at that time, a plan to "retain all of the employees in the unit" (406 U.S. at 295).

that the Board had "fairly" interpreted the testimony (Pet. App. 6a) and determined that there was sufficient evidence to find that Bachrodt was required to bargain over his initial terms of employment of his predecessor's employees (Pet. App. 7a).[6]

By enforcing the Board's decision on an incomplete and ambiguous record, and by improperly placing the burden on Bachrodt to come forward with additional evidence to clarify the record, the court of appeals ignored the evidentiary standard set forth in *Burns*.[7]

B. The Court of Appeals Decision Presents An Important Question of Federal Law Because It Is Based on an Overly-Broad Construction of the Exception to the *Burns* Rule Which Conflicts with the Decision of Another Court of Appeals and with Other Board Decisions.

It is clear from a reading of the Supreme Court's opinion in *Burns* that the "perfectly clear instance" dictum therein was intended to provide a narrow exception, and not a general qualification upon the basic right of a successor to set initial terms of employment without bargaining. The exception, we submit, was included merely as a hedge against some

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[6] Significantly the court of appeals never mentioned the *Burns* evidentiary standard (406 U.S. at 294-295) when it discussed the facts of this case, and never indicated that the evidence was "perfectly clear."

[7] The thrust of our argument stated above is not, of course, limited to an assertion that there simply was not substantial evidence to support the findings of the Board and court of appeals. The issue presented is not factual, but rather concerns the failure of the court below to apply the evidentiary standard set forth in *Burns*.

unusual set of circumstances in which application of the basic rule would be inappropriate. The routine purchase of some of the assets of an automobile agency is not the kind of unique situation that requires such exceptional treatment.

In *Burns* the Supreme Court held that it did not intend to impose on the new owner any duty to bargain or even to consult with the union before setting individual terms of employment. Indicative of this, the Court said, 406 U.S. at 287-288:

> "A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital."

The effect of the Board's and court of appeals' decisions in this case is to cast aside the rule enunciated in *Burns* which was to encourage the transfer of capital by freeing the purchaser of any obligation to that union, under either contract or statute, until after the successor had hired its new employees.

The decisions below further penalize a new owner for providing jobs for its predecessor's employees. At a minimum, they will increase the apprehension of predecessors' employees by forcing successor employers to defer any commitments to those employees until after they commence their operations. And more seriously, they surely encourage any purchaser

to terminate all employees of a predecessor and destroy the job security of the employees.

The Sixth Circuit in *N.L.R.B.* v. *Wayne Convalescent Center, Inc.*, 465 F.2d 1039 (1972), handed down a unanimous decision which sharply conflicts with the court of appeals decision in the instant case. In *Wayne* the predecessor employer negotiated a contract with the union several months prior to the new owner taking over the convalescent home through foreclosure proceedings. The new owner and successor had knowledge of the existence of both the union and the contract which had been negotiated by its predecessor. The successor retained substantially all of the predecessor's employees. The Sixth Circuit held that *Wayne* was a successor employer and was under a duty to bargain with the union. However, the court pointed out that making unilateral changes in conditions of employment was not a violation of such duty to bargain. Further, the court held that the successor was free to establish its own terms of employment initially without consulting the union. And the court held that the changes constituted the initial terms of employment, even though they were made one month after Wayne had begun operating the nursing home. The Sixth Circuit emphasized that under *Burns* (465 F.2d at 1043):

> "The successor employer must be allowed to be free to establish its initial terms of employment of the predecessor's employees. To hold otherwise would make necessary changes in the conditions of employment nearly impossible without lengthy bargaining, and further inhibit a potential successor's desire to acquire an unsuccessful business. The Board therefore cannot rely on

the unilateral changes in conditions of employment made by Wayne to find a refusal to bargain, and a violation of the Act."

Judge Stevens also recognized the importance of these considerations in his dissent to the court of appeals earlier decision in this case. Judge Stevens said (Pet. App. 38a-40a):

> "As I read the Court's dictum in *Burns*, it must have been 'perfectly clear' *prior to the closing* that all employees in the unit would be retained. Otherwise it would not be 'appropriate' —to use the Court's word—to saddle the new owner with any duty to bargain, or even to consult, with the union before setting initial terms of employment. The employment of union members *after* the closing may properly give rise to a duty to bargain with the union concerning subsequent changes from the initial terms of employment; I do not believe, however, that such post-closing hiring may retroactively establish a preclosing duty to bargain.
>
> "In short, I consider the brief excerpt from *Burns* as positing a narrow exception from the ordinary situation in which the successor has complete freedom to set initial terms. I regard this case as one involving an ordinary purchase transaction in which the new owner should not be penalized because he in fact provided jobs for substantially all of his predecessor's employees. . . .
>
> "As a practical matter I wonder how much difference there is between a holding that the new owner is bound by the terms of the old contract, and a holding that he is bound only until he has bargained to impasse with the union. No

doubt there are cases in which the impasse date would arise much sooner than the contract expiration date, but in my judgment the time interval between those dates is not critical importance in evaluating the policy factors involved. What is most important—and I believe *Burns* makes this clear—is the new owner's position at the time he takes over the acquired business. In the normal situation the *Burns* holding encourages the transfer of the capital by freeing the purchaser of any obligation to the union, either contractually or in the form of a duty to bargain, until after a new complement of employees has been hired. The *Burns* decision, in effect, finds greater public benefit in preserving the successor's ability to make immediate operating changes than in affording maximum job security to the employees of the purchased business. If only the time interval between the impasse date and the expiration date of a preexisting contract were on one side of the balance, it certainly would not have outweighed the interests of the employees in clearly defined job security." (Emphasis in original).

The court of appeals and the Board ignore these underlying reasons for the *Burns* rule in the present case and over-emphasize the exception to that rule, to the point where it becomes a broad limitation on the basic right the Supreme Court sought to protect. The effect of these decisions is to impose a precondition upon the successor's right to set the initial terms of employment for its operation.

Thus, the Board faults Bachrodt for not affirmatively notifying the Zimmerman employees prior to November 10 that new terms of employment would

be imposed and "that they were to accept them or not appear for work." (Pet. App. 13a). Similarly, the court of appeals observed that although the record shows that the changes in working conditions were announced to the employees on Monday, November 10, the record does "not suggest that Bachrodt on any previous day stated that the terms and conditions of employment might or would be different under the new owner." (Pet. App. 7a). Under such a requirement, the successor's rights are made to hinge, not upon whether it actually committed itself to hire all of the predecessor's employees, but on whether it clearly notified them in advance that they would not be hired unless they were willing to accept new terms of employment.

In short, the opinions below construe the dictum in the Supreme Court's opinion as establishing, not an exception, but a precondition to the general rule. Instead of looking to see whether the successor took some action which made it "perfectly clear" that it planned to retain all the employees in the unit, the Board and court focus on whether it took steps to make it clear it did *not* intend to retain them without changes. We submit that this approach distorts the meaning of *Burns* and is inconsistent with the overall thrust of this Court's decision.

This approach is particularly at odds with the further statement in *Burns* that the successor employer's bargaining obligation does not mature until it had selected its full complement, and until that time, the new employer has no obligation to bargain with the incumbent union over the initial employment terms the successor employer wishes to impose

(406 U.S. 295). Thus, even assuming the correctness of the Board's and court of appeals' determination that Bachrodt had completed hiring its work force when it took over the business on Monday, November 10 (Pet. App. 5a-6a, 14a), there is nothing in *Burns* that required Bachrodt to indicate to the employees prior to that time that it intended to make any changes in their terms and conditions of employment.

The importance of Supreme Court review of this case to the proper administration of the Act is indicated by subsequent policy statements of the Board in decisions which conflict directly with the Board and court of appeals decision here. The Board itself appears to have readjusted its interpretation of the *Burns* dictum in cases decided subsequent to its supplemental decision herein. Thus, in *Spruce-Up Corporation*, 209 NLRB No. 19 (decided February 28, 1974), applic. for enfct. on other grounds pending (4th Cir. Docket No. 74-1749), the Board majority expressly rejected any interpretation of the *Burns* caveat which, in effect, would require "an employer desirous of availing himself of the *Burns* right to set initial terms . . . to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms, a right to which the Supreme Court attaches great significance in *Burns*." Any such interpretation, the Board stated, "would be subject to abuse, and would, we believe, encourage employer action contrary to the purposes of this Act and lead to results which we feel sure the Court did not intend to flow from its decision in *Burns*." For, as the Board continued:

> ". . . the more cautious employer would probably be well advised not to offer employment to at least some of the old work force under such a decisional precedent. We do not wish—nor do we believe the Court wished—to discourage continuity in employment relationships for such legalistic and artificial considerations."

Accordingly, the Board in *Spruce-Up* announced that:

> "*We believe the caveat in Burns, therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment*, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." (Emphasis added.)

Although one may seriously question the internal consistency of this formulation, we believe that the italicized portion of the Board's statement represents a proper interpretation of the *Burns* rule. It would ensure the basic right of the successor to set its own initial employment conditions except in those instances where it has actually done something to commit itself in advance to hiring the former unit employees. See also *Greengate Mall, Inc.*, 209 NLRB No. 2 (decided February 14, 1974).[8]

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[8] The Board's *Spruce-Up* policy was further explained by the Board in *Antia Shops, Inc.*, 211 NLRB No. 74 (decided June 12, 1974). (No misleading of employees seen where there was no advance notice to employees of the new terms, but also no advance commitment as to their employment); and

In the instant case, as in *Spruce-Up*, *supra*, the new employer (Bachrodt) did nothing, either actively or tacitly, to mislead the employees into believing that they would all be retained without change in their terms of employment. As we have demonstrated, the only action Bachrodt is shown by this record to have taken prior to the November 10 meeting, where new terms of employment were announced, was the passing out of applications to Zimmerman's employees. This was clearly not enough to amount to a commitment on Bachrodt's part to hire them all without any changes.

Furthermore, even assuming *arguendo* that the evidence did show that Bachrodt had interviewed the employees on Friday, November 7, and told them all to report to work on Monday, we do not believe this action, by itself, could be construed as a promise to retain them all on the same terms as they had previously worked. It is not contended that Bachrodt ever said anything in these interviews about paying the same wages, keeping the same hours, or maintaining the same working conditions. Nor can the Board point to any conduct by Bachrodt which implied that this would be the case. When the first thing an employer does upon taking over a new business is to

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in *Boeing Co.*, 214 NLRB No. 32 (decided November 1, 1974), petition for review pending (D.C. Cir. Docket No. 74-1056) (Rejected the General Counsel's contention that the employer had a "perfectly clear" plan to retain a substantial majority of the employees, even though it was undisputed that the employer intended to hire all or substantially all of the incumbent employees, because the employer's "intentions" were tied to lower rates and benefits which the employees might not accept.)

call the predecessor's employees together and announce that it will not be operating under the same terms as its predecessor, it requires very clear evidence to conclude that it had actively or tacitly committed itself to do just the opposite. There is no such evidence here. Accordingly, the Board's decision in the instant case imposes a more stringent bargaining obligation upon Bachrodt than was imposed upon the employer in *Spruce-Up*. Such divergent applications of the federal labor laws are manifestly appropriate for review by this Court.

Because the decision of the court of appeals in the instant case improperly construes the *Burns* exception and conflicts with another court of appeals decision, as well as with subsequent Board interpretations of the *Burns* decision, this case involves important issues of federal law which should be clarified and settled by this Court.

CONCLUSION

For the foregoing reasons, it is urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

FRANCIS E. HICKEY
KENNETH C. MCGUINESS
ROBERT E. WILLIAMS
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

No. 73-2032

Argued May 29, 1974

May 19, 1975

"Unpublished Order"
Not to be cited per Circuit Rule 28.

Before

Hon. TOM C. CLARK, Associate Justice *
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

BACHRODT CHEVROLET CO.,
Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board

ORDER

This case involves a transfer to a successor employer of an operating automobile sales and service

* Associate Justice Tom C. Clark (Retired) of the Supreme Court of the United States is sitting by designation.

establishment and the question, under the circumstances, of when the successor employer's duty to bargain collectively with the continuing work force first arose. This decision is a sequel to *N.L.R.B.* v. *Bachrodt Chevrolet Co.*, 468 F.2d 963 (7th Cir. 1972), *vacated and remanded*, 411 U.S. 912 (1973).

In 1970, the Board found that Bachrodt purchased assets from Zimmerman November 10, 1969, and substantially continued the business; that Bachrodt refused to honor the collective bargaining agreement between Zimmerman and the union which represented the employees, refused to bargain with the union, and changed certain working conditions without notice to or consultation with the union; and that its conduct constituted 8(a)(5) and 8(a)(1) unfair labor practices. The Board ordered, among other things, that Bachrodt honor the collective bargaining agreement, bargain with the union, cancel certain unilaterally made changes, and make restitution for benefits lost by virtue of the changes.

The Board did not then have the benefit of the Supreme Court decision in *N.L.R.B.* v. *Burns Security Services*, 406 U.S. 272 (1972). The parties doubtless would have more specifically pursued at the hearing the factual inquiries which became more significant by reason of *Burns*. On review in this court, decision was postponed until *Burns* was decided.

After the decision in *Burns*, this court denied enforcement of the part of the Board's order which required that Bachrodt abide by the Zimmerman agreement. This court decided, however, that the Board's finding of an unfair labor practice in that

Bachrodt unilaterally changed the working conditions was supportable under *Burns*. Noting that the critical question under *Burns* was whether the changes predated or postdated the commencement of the duty to bargain, this court deemed it apparent that as of November 7, 1969, Bachrodt planned to retain all the employees in the unit and that the rehiring took place before the November 10 change in conditions of employment, and that the changes made November 10 therefore were made in derogation of an existing duty to bargain. *N.L.R.B.* v. *Bachrodt Chevrolet Co., supra.*

In Bachrodt's petition for certiorari, the Supreme Court entered the following order:

> "Certiorari granted, judgment vacated, and case remanded with instructions to remand case to the National Labor Relations Board for such further proceedings as may be appropriate in light of *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972). *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 245-250 (1972); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943)."

Accordingly, this court remanded the case to the Board. The Board called on the parties for statements of position, but did not conduct a further evidentiary hearing. Neither party pressed for such hearing. Bachrodt did say in its conclusion, after urging findings in its favor on the existing record, that if there were doubt about the factual situation, there should be further hearing, but it did not describe any proof it would expect to offer.

In its supplemental decision, 205 NLRB No. 122 (1973), the Board reviewed the evidence before it in the light of the relevant tests in *Burns*, and, in sum, found that as of November 7, Bachrodt planned to retain all the employees in the unit, and that when it took over the business on November 10, it had completed hiring its work force of 22, all of whom had worked for Zimmerman. Therefore Bachrodt then had a bargaining obligation as a successor to Zimmerman, and was not free thereafter to establish or change conditions of employment without bargaining with the union. The Board amended its original order by deleting the portions resting upon an obligation to abide by the Zimmerman collective bargaining agreement, but left the other provisions in force.

The record clearly shows the following facts:

On October 28, 1969 Bachrodt and Zimmerman made a "Buy and Sell Agreement," for the sale to Bachrodt of certain parts and accessories, miscellaneous material inventories and shop supplies, machinery and shop equipment, new vehicle inventory and demonstrators. Provisions were made for determinations of values, to constitute the purchase price, and to be paid no later than November 30, on which date documents such as the bill of sale were to be delivered. Possession was to be transferred on or before November 10, and various charges such as rentals on the leased premises were to be prorated to the date of transfer of possession. Zimmerman agreed to operate the business in a normal manner until delivery of possession.

Possession was transferred on November 10, apparently at the opening of business.[1]

The change in ownership was announced to the employees Thursday, November 7. Mr. Bachrodt gave the Zimmerman employees applications at least in part on Friday, and in any event before Monday. With one or two exceptions, all the Zimmerman service employees worked for Bachrodt on Monday in the same capacities they had worked on Friday.[2]

The Board interpreted the testimony as stating that the interviews had all been completed before the employees appeared for work on Monday, November

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[1] "Trial Examiner: Was there a hiatus period between—as far as the operations of the premises, as far as auto sales and service—more than since Saturday noon?

"The Witness [Bachrodt]: No, We were open Monday morning for business."

[2] Mr. Bachrodt testified: "I went around personally and handed them all one . . . . In some cases, I think it was Friday afternoon, before Monday."

He further testified: "—I handed all the employees an application to fill out, on which I then looked at each individual application and decided whether I would like to have them work for me or not." He also interviewed each one.

Mr. Bachrodt also testified:

"Trial Examiner: Do you know if anybody else worked for Zimmerman who didn't go to work for you that Monday morning?

"The Witness: I'm not exactly positive who they were, and I didn't know who was in the organization, but there was one or two individuals who elected not to work for me and really never even applied for a job. When they heard Bob Zimmerman was selling, they left.—I think they left on Friday. One for sure, and I think there was one other one."

10. That placed the completion of hiring prior to the announcement to a group meeting on Monday that the conditions of employment would be different in certain respects. We think the testimony in context can fairly be so interpreted, although one of Bachrodt's answers is susceptible to the interpretation that the interviews and hiring took place on Monday,[3] and answers of employee Bocker could be interpreted as putting the interview on November 10, although it seems likely he was confusing the interview with the meeting at which changes were announced.[4]

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[3] "Q When Bachrodt Chevrolet took over on November 10th, what if anything did you do with regard to the men who had worked for Zimmerman with regard to taking applications or anything else? Just tell us what you did that day.

"A Before we took the place over we handed out applications to everybody. They were filled out and turned back in to us, and at that time we looked over each and then each man was interviewed. We decided whether to hire them, or they could make a decision on whether they wanted to work for me."

[4] "Trial Examiner: When these items were changed on November 10th—Incidentally, were you told about the holiday change back on November 10th?

"The Witness: I believe I was, because I went in for an interview with Mr. Bachrodt and he told me what our new pay schedule would be and what the holidays would be and so forth.

"Trial Examiner: Do you know whether others were told on November 10th?

"The Witness: We had a group meeting in the rear service room, and there were items covered then. I can't recall exactly what they were.

"Trial Examiner: Were they the new conditions you were working under?

"The Witness: Many of them, yes."

The record shows that the changes in working conditions complained of were announced to the employees at a meeting Monday, November 10. It does not suggest that Bachrodt on any previous day stated that the terms and conditions of employment might or would be different under the new owner.

As already indicated, counsel would undoubtedly, if they had had *Burns* before them, have asked more pointedly about the sequence of interview, Monday morning opening, and announcement of changes. We do not, however, fault the Board for attempting to resolve the issue on the evidence before it, particularly in the absence of any representation as to what the testimony would be if a further hearing were held.

We are fortified in our conclusion by the views of the members of the court when this case was here earlier. Chief Judge Swygert and Judge Eschbach found it apparent from the record that, as of November 7, Bachrodt planned to retain all the employees in the unit, and that in any event the announced changes must have followed the formal rehiring, 468 F.2d at 969. Judge Stevens, although dissenting, indicated that a finding that Bachrodt had planned to retain all the employees in the unit might be proper. 468 F.2d at 972. He pointed out however, that the Board had not made such finding.

Counsel for Bachrodt suggests that the Board's emphasis in this case upon the fact that Bachrodt did not advise the employees in advance that there would be changes or that they must accept the changes or not appear for work Monday is contrary to the spirit of *Burns*. We think, however, that the facts

of *Burns* are clearly distinguishable and that it is reasonable to hold that when the successor permits the predecessor's work force to come to work without any notice that the successor's terms will be different there is an implication that his terms are the same. See *Burns*, 406 U.S. at 294-95.

The Supreme Court did not, in vacating the earlier judgment of this court, repudiate the theory of our majority's application of *Burns*. Rather, by citing *FTC* v. *Sperry & Hutchinson Co.* and *SEC* v. *Chenery Corp.*, the Court indicated that consideration of the facts in the light of *Burns* was a task appropriate for the administrative agency and not for the reviewing court.

In *Collinge Enterprises, Inc.*, 210 NLRB No. 8 (1974), the Board considered a case where the employees were told before the transfer that the wages to be paid by the successor would be lower. When offered employment, five out of six accepted. The Board said it was apparent that the retention as employees was contingent upon acceptance of the newly offered terms. "Such tentative offers of employment do not, in our opinion, make it perfectly clear that the new employer plans to retain all of the employees in the unit as we interpret the opinion of the Supreme Court." The Board held, however, that after operations commenced and the successor's duty to bargain had matured, the successor violated its obligation to bargain by raising wages without consultation with the union. The rationale of *Collinge* is consistent with the Board's conclusion here.

The Board's order will be enforced.

APPENDIX B

Bachrodt Chevrolet Co. *and* Lodge 1096, International Association of Machinists and Aerospace Workers, AFL-CIO. Case 38-CA-811

August 27, 1973

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING AND JENKINS

On December 3, 1970, the National Labor Relations Board issued its Decision and Order [1] in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act and ordering that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in an appropriate unit and honor and abide by the collective-bargaining agreement executed by the Union and Respondent's predecessor. The Board also ordered Respondent to make restitution to employees for any losses suffered by virtue of Respondent's failure to abide by the collective-bargaining agreement or by its institution of certain unilateral changes. In light of the Supreme Court's opinion in *N.L.R.B.* v. *Burns International Security Services, Inc.* 406 U.S. 272, enforcement of the Board's Order, except insofar as it required Respondent to abide by the collective-bargaining agreement executed between Respondent's

[1] 186 NLRB 1035.

predecessor and the Union, was granted on September 13, 1972, by the United States Court of Appeals for the Seventh Circuit.[2] Subsequently, Respondent petitioned the Supreme Court of the United States for certiorari, and, on April 2, 1973, the Supreme Court granted Respondent's motion, vacated the United States Court of Appeals' judgment, and remanded the proceeding to that court with instructions to remand the case to the Board for such further proceedings as may be appropriate, in light of *N.L.R.B.* v. *Burns International Security Services, Inc., supra, Federal Trade Commission* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 245-250 (1972); *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80, 87-88 (1943).

On May 8, 1973, the United States Court of Appeals issued an order which remanded the case to the Board.

On May 21, 1973, all parties were requested to file with the Board statements of position with respect to the issues raised in this case in light of *Burns*.

The General Counsel and the Respondent each filed a statement of position which the Board has duly considered.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In its original decision in this case, the Board found that Respondent had violated Section 8(a)(5)

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[2] 468 F.2d 963 (1972).

and (1) of the Act by refusing to bargain collectively with the Union, by refusing to abide by its predecessor's collective-bargaining contract with the Union, and by unilaterally changing the wages, working conditions, and other terms and conditions of employment for its employees. In light of *Burns*, the finding that Respondent violated Section 8(a)(5) and (1) by refusing to adhere to the predecessor's collective-bargaining contract cannot stand. Accordingly, this finding is hereby rescinded. However, the Board adheres to its other findings that Respondent violated Section 8(a)(5) by refusing to bargain with the Union on and after November 10, 1969, and by making certain unilateral changes in working conditions on and after November 10, 1969, as set forth hereinafter.

The Board found in our original Decision that Respondent was a successor to Zimmerman Chevrolet, Inc., which had been recognizing the Union as the bargaining representative of its employees, inasmuch as Respondent "continued to operate in the same business as its predecessor with substantially the same work force." The Board also found that Respondent as of November 10, 1969, took over and operated the predecessor's body shop as an integral part of its operations and that the employees working therein were among its employees. Nothing in *Burns* requires the Board to change these findings. Accordingly, we affirm them. Additionally, we affirm our earlier finding that when Respondent refused to bargain with the Union, on and after November 10, 1969, it violated Section 8(a)(5) and (1) of the Act.

In the earlier case, the Board also found that Respondent violated Section 8(a)(5) of the Act when it altered certain working conditions of the employees in the bargaining unit. The Respondent contends that *Burns* requires the Board to reverse its finding that Respondent violated Section 8(a)(5) by making such unilateral changes.

In *Burns*, the Supreme Court held that in the ordinary situation a successor-employer is free unilaterally to set initial terms on which it will hire the employees of a predecessor, since, until the successor-employer has hired his full complement of employees, it may not be clear that the union represents a majority of employees in the unit. However, the Court also stated that:

> [T]here will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

The General Counsel contends that the instant case is one of the type referred to by the Supreme Court in the above-quoted language. We agree. Additionally, he contends, there is sufficient evidence to warrant a finding that at the time Respondent announced and instituted the unilateral changes on November 10, 1969, the Respondent had hired its full complement of employees, and it was clear that the Union represented a majority of the employees in the unit. In these circumstances, he argues, Respondent had an

obligation to bargain with the Union when it already had selected its work force.[3]

The evidence indicates that the work force was hired prior to the announcement of the changes, and that such changes had not been a part of the initial terms of rehiring. On November 6, 1969, Zimmerman announced the pending sale to its employees and, on November 7, Respondent handed applications to all the unit employees. Louis Bachrodt, Respondent's president, testified as follows:

> Before we took the place over we handed out applications to everybody. They were filled out and turned back in to us, and at that time we looked over each and then each man was interviewed. We decided whether or [sic] hire them, or they could make a decision on whether they wanted to work for me.

It is clear that all those who had received an application on Friday, November 7, and had been interviewed by Respondent, prior to their appearance for work on Monday, November 10, with the exception of one or two who did not return the application. There is nothing to indicate that these employees were aware of the proposed changes on November 7, and nowhere does it appear that they were to accept them or not appear for work on Monday. From the proffered testimony, we find the impression conveyed at the November 7 meetings was precisely the opposite, and that, as the court of appeals concluded, "the untested changes in working

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[3] *N.L.R.B.* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 295.

conditions had not been a part of the initial terms of rehiring."

Therefore we find that, when Respondent took over the business on November 10, it had completed hiring its work force, which consisted of 22 employees, all of whom had formerly worked for Zimmerman. Under the teaching of *Burns*, Respondent had a bargaining obligation as a successor to Zimmerman. Its position on that date was akin to that of an employer confronted with a newly selected bargaining representative. It was not free thereafter to establish or change conditions of employment for unit employees without bargaining with the Union.[4]

Moreover, from the facts detailed above, it is apparent that as of November 7 Respondent planned to "retain all of the employees in the unit" and at such time "it was appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." Indeed, the Union made its first bargaining demand on November 7. Thus, it is clear that Respondent planned to, and did, retain virtually all of its predecessor's employees in the unit, and that these employees were represented by the Union and constituted a majority of the unit both before and after the transfer of ownership. Accordingly, we reaffirm the balance of our original Order, which includes requiring Respondent to bargain with the Union and to make restitution for any benefits which may have been lost by virtue of the unilateral changes in the terms and working conditions of employment as set forth in our original Decision and Order.[5]

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[4] *Ranch-Way, Inc.*, 203 NLRB No. 118.

[5] See *Howard Johnson Company*, 198 NLRB No. 98.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that its Order of December 3, 1970, be amended as follows:

1. Delete paragraph 1(b) of the Board's Order and reletter the succeeding paragraphs accordingly.

2. Delete paragraphs 2(c) and 2(d) of the Board's Order and reletter the succeeding paragraph accordingly.

3. Substitute the attached Appendix for that attached to our Decision and Order of December 3, 1970.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Lodge 1096, International Association of Machinists and Aerospace Workers, AFL-CIO, as the bargaining representative of the full-time and regular part-time nonsupervisory employees in our service department.

WE WILL NOT make changes in the working conditions of such employees without notice to and consultation with such labor organization.

WE WILL, on request, cancel certain changes in working conditions which we instituted on or

about November 10, 1969; and WE WILL pay employees for losses, if any, suffered as a result of our having made the changes.

WE WILL NOT, in any manner, interfere with, restrain, or coerce our employees in the exercise of their right to organize; to form, join, or assist a labor organization; to bargain collectively through a bargaining agent chosen by themselves; to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any such activities except to the extent that the right to refrain is limited by the lawful enforcement of a lawful union-security clause.

BACHRODT CHEVROLET CO.
(Employer)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 10th Floor, Savings Center Tower, 411 Hamilton Boulevard, Peoria, Illinois 61602, Telephone 309-673-9312.

APPENDIX C

U.S. COURT OF APPEALS
SEVENTH CIRCUIT (CHICAGO)

NLRB

v.

BACHRODT CHEVROLET CO.

NATIONAL LABOR RELATIONS BOARD v. BACHRODT CHEVROLET COMPANY, No. 71-1354, May 8, 1973

On remand from the U.S. Supreme Court (82 LRRM 2998). Case remanded to NLRB.

See also 81 LRRM 2244, 468 F.2d 963.

Before SWYGERT, Chief Judge, STEVENS, Circuit Judge, and ESCHBACH, District Judge.*

Full Text of Order

The Supreme Court of the United States on April 2, 1973 took the following action in this case, 82 LRRM 2998:

The petition for certiorari is granted, the judgment is vacated, and the case is remanded to the Court of Appeals with instructions to remand the case to the National Labor Relations Board for such further proceedings as may be appropriate, in light of NLRB v. Burns International Security Services,

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* District Judge Jesse E. Eschbach of the Northern District of Indiana is sitting by designation.

Inc., 406 U.S. 272, 80 LRRM 2225 (1972). FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 245-250 (1972); SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943).

On consideration thereof, it is ordered that the case is remanded to the National Labor Relations Board for such further proceedings as may be appropriate in light of NLRB v. Burns International Security Services, Inc., 406 U.S. 272, 80 LRRM 2225 (1972). FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 245-250 (1972); SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943).

APPENDIX D

J-6992
Bachrodt Chevrolet Co.

SUPREME COURT OF THE UNITED STATES

BACHRODT CHEVROLET CO.

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

No. 72-1075. Decided April 2, 1973

PER CURIAM.

The petition for certiorari is granted, the judgment is vacated, and the case is remanded to the Court of Appeals with instructions to remand the case to the National Labor Relations Board for such further proceedings as may be appropriate, in light of *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972). *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 245-250 (1972); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

It is so ordered.

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* 38-CA-811; 186 NLRB No. 151.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

November 9, 1972.

No. 71-1354

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *District Judge*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

BACHRODT CHEVROLET CO.,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board.

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all members of the panel having voted to deny a rehearing.

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1971 JANUARY SESSION, 1972

No. 71-1354

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BACHRODT CHEVROLET CO.,
Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board.

Argued February 18, 1972—
Decided September 13, 1972

Before SWYGERT, *Chief Judge,* STEVENS, *Circuit Judge* and ESCHBACH, *District Judge.*[1]

SWYGERT, *Chief Judge.* This review of a National Labor Relations Board order concerns the relationship between a successor employer and an incumbent union: (1) Whether a transfer of some but not all of the assets of an existing business and the assumption of some but not all of its obligations effects a successor relationship; and (2) if so, whether the successor is required by law to honor an existing col-

[1] District Judge Jesse E. Eschbach of the Northern District of Indiana is sitting by designation.

lective bargaining agreement and to bargain with the incumbent union. A third issue concerns an asserted "good faith" doubt entertained by the new employer that the union represented a majority of the employees.[2]

For a number of years the Lou Bachrodt Chevrolet Company of Rockford, Illinois had been a competitor of Zimmerman Chevrolet, Inc. located at nearby Freeport, Illinois. In the latter part of October 1969 the companies entered into a "Buy and Sell" agreement. Under its terms, Bachrodt agreed to purchase Zimmerman's new automobiles and trucks on hand and on order, new parts and accessories, miscellaneous inventories of materials, shop equipment and supplies, and to assume the leases covering the properties on which Zimmerman conducted its business. Work in progress in the repair and body shops was to be completed by Bachrodt at Zimmerman's expense. Current taxes, insurance, and similar charges were to be prorated. Bachrodt was to receive a copy of each contract or labor agreement to which Zimmerman was a party but only agreed to assume the obligations under a telephone directory contract, an inventory service contract, a pension plan Zimmer-

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[2] The Board's decision and order are reported at 186 N.L.R.B. No. 151 (1970).

At the time we heard oral argument, *NLRB* v. *Burns Int'l Security Servs., Inc.*, 441 F.2d 911 (2d Cir.), was pending in the Supreme Court on *certiorari*, 404 U.S. 822 (1971). Since the questions before the Court had an important bearing on our decision, we withheld our ruling. The Supreme Court's decision was announced May 15, 1972 (40 U.S.L.W. 4499), and thereafter we permitted the parties to file supplemental briefs.

man had created for its employees, and an employees' group life and health insurance plan. No used cars or trucks were to be sold to Bachrodt, nor were Zimmerman's accounts payable or accounts receivable to be transferred to Bachrodt. In addition, the buy and sell agreement made no reference to Zimmerman's body shop. Finally, the entire transaction was subject to the approval of the General Motors Corporation and the grant to Bachrodt of an exclusive Chevrolet dealer franchise in Freeport. The agreement provided that the transfer of the title and possession of the assets was to take place on November 10, 1969.

Zimmerman's last day of operation was Saturday, November 8. Bachrodt's operations which began Monday, November 10, were identical with those of Zimmerman. Although there was evidence that Zimmerman's body shop manager, Russ King, had been negotiating with Zimmerman for the purchase of the body shop at the time the buy and sell agreement between Zimmerman and Bachrodt was executed, King's attempts to finance his purchase had not been completed by November 10. As a consequence, Bachrodt took over the body shop with the rest of Zimmerman's assets on that date and operated it until November 15 when the sale to King was consummated. Although the arrangements among the parties are not entirely clear, we think the trial examiner correctly found that on November 10 Bachrodt "took over and operated Zimmerman's old body shop as an integral part of its operation, and the bodymen working at the shop were among its employees."

After the change in ownership there was a turnover among top management; however, Bachrodt re-

tained Zimmerman's sales manager, four of its five salesmen, and two clerical employees. Bachrodt also retained all except two of the employees who worked in both the repair and body shops.

For many years the service department employees had been represented by Lodge 1096, International Association of Machinists and Aerospace Workers, AFL-CIO. In 1955, at a time when the Freeport Chevrolet agency was being operated by George F. Monroe (Zimmerman's predecessor), an election was held among certain employees of Monroe supervised by the mayor of Freeport, in order to determine whether they wished to be represented by the union. A majority of the employees voted in favor of such representation, and thereafter Monroe entered into a series of collective bargaining agreements. Similar agreements were made with Zimmerman after 1960. Each was a one-year contract, calling for an automatic year-to-year extension in the absence of notice to the contrary by either party. The last contract was signed on February 8, 1967. A year later, after meeting to evaluate the contract, Zimmerman's employees decided to request no changes. Since neither party gave the required notice requesting a renegotiation, the contract was automatically renewed for an additional year.

A few days prior to the transfer of the company from Zimmerman to Bachrodt, the employees were informed about the impending change in ownership, and representatives of the new company distributed job applications among the employees. On November 7, the union addressed a letter to the new owners pointing out that its "existing" agreement with Zimmerman was effective until February 1970 and that

it was the union's "position that said labor agreement, in all its terms and provisions [was] equally binding on you as it was on Mr. Robert Zimmerman." Counsel for Bachrodt replied, stating that the company refused to negotiate with the union. Two days later the union again wrote the company requesting a meeting with regard to the "existing labor agreement" and also "to negotiate any and all matters pertaining to . . . conditions of employment" of its members employed by Bachrodt in Freeport. On November 14 the company reiterated its position. It refused to meet with the union, asserting that it did "not know of its own knowledge if any of the former employees of Zimmerman . . . are represented" by the union. The company added that if the employees wished to have the union represent them they could apply to the National Labor Relations Board for an election.

In the meantime, on November 10, Bachrodt announced and later implemented a number of working conditions different from those applied by Zimmerman. These included a new method of computing the wages of the service mechanics, the termination of vacations with pay, and the initiation of mandatory Saturday morning work if an employee was so assigned.

The Board found that Bachrodt was a successor to Zimmerman, and, accordingly, had violated sections 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain with the union as the bargaining representative of its employees; by unilaterally changing its conditions of employment; and by refusing to honor the February 8, 1968 contract between Zimmerman and the union which was auto-

matically renewed for one year on February 9, 1969. The Board's order, besides directing the company to cease the unfair labor practices found, required the company, upon request, to bargain with the union, to honor the existing collective bargaining agreement, and to make restitution for any benefits which may have been unlawfully withheld from the employees by reason of the company's failure to abide by the existing contract and for any benefits lost because of its unilateral institution of changes in working conditions.

I

The facts attending the transfer of the Chevrolet dealership in Freeport leave no doubt that the successorship doctrine was properly applied by the Board. The law establishes that if, after a transfer of assets and employees from one employer to another, the identity of the employing enterprise continues, the new employer has the duty as a "successor" to recognize and bargain with the union representative of the employees. *See, e.g., NLRB* v. *Armato*, 199 F.2d 800 (7th Cir. 1952); *NLRB* v. *Auto Ventshade, Inc.*, 276 F.2d 303 (5th Cir. 1960). A mere change in the ownership of the employing enterprise does not, by itself, relieve the new employer of bargaining with the existing representative of those employees who continue to be employed in the enterprise after the changeover. *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F.2d 1025 (7th Cir. 1969). The Supreme Court in its recent decision in *NLRB* v. *Burns International Security Services, Inc.*, 40 U.S.L.W. 4499 (U.S. May 15, 1972), approved a Board order requiring a new employer to bargain with an existing union based solely on the fact that the new employer had "se-

lected as its work force the employees of the previous employer to perform the same tasks at the same place they had worked in the past." In its decision the Court, speaking through Mr. Justice White, commented: "It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period if a majority of the employees after the change of ownership or management were employed by the preceding employer."

In the case before us, the Board found that Bachrodt's operations did not differ materially from those of Zimmerman. No other finding would have been warranted by the record. That Bachrodt did not purchase Zimmerman's entire assets or assume all its obligations is immaterial. The important fact is that the employing enterprise, here the Freeport Chevrolet dealership, with respect to the nature of its business, was not materially changed. When that is considered with the fact that the new owner took over twenty-two of the twenty-four employees in the bargaining unit, there can be no question that in the context of labor law, Bachrodt is a successor employer.

Our conclusion is unaffected by the fact that the body shop was operated by Bachrodt only for a few days after the transfer. Indeed, even if the body shop had been transferred to King prior to November 10, we would continue to characterize Bachrodt as a successor employer. Without counting the body shop employees, the company retained sixteen of the twenty-four employees in the bargaining unit. More-

over, the employing enterprise was substantially the same (although performing one less function) after the body shop was transferred to King.

II

Bachrodt contends that even if it was Zimmerman's successor, its good faith doubt about the union's continuing majority status negated any obligation to bargain with the union in regard to the working conditions of the service department employees. To support its contention the company argues that certain facts should be considered: The union had never been certified by the Board; the only election among the employees was conducted by Freeport's mayor in 1955; since then, with one exception, there had been a complete turnover of employees; the last collective bargaining contract was signed twenty-two months before the change in ownership (the contract having automatically renewed itself in February 1969); and, since there was no dues checkoff provision in the agreement, the employer had no record of the dues paying members.

However relevant the foregoing facts are, they could not, without more, form a reasonable basis for doubting the incumbent union's majority. Indeed, a review of the evidence suggests the opposite. The union had negotiated a series of collective bargaining agreements since 1955, first with Monroe, then with Zimmerman; the last agreement was negotiated in February 1968 and automatically renewed in February 1969. There was no direct evidence—not even a hint—that the union did not represent a majority of the employees in 1955 and nothing to indicate a change in circumstances since that time.

Bachrodt, referring to *Burns*, emphasizes the failure of the union to be certified as the representative of the employees. However, as Bachrodt concedes, *Burns* did not involve a good faith doubt claim and therefore is not directly in point on this issue. To be sure, dicta in *Burns* indicates that a good faith doubt could not have been claimed in the face of a recent Board certification. But that is not to say that *Burns* also supports the obverse. Lack of certification does not by itself sustain a finding of a good faith doubt. *See* 40 U.S.L.W. at 4501, n. 3. When, as here, there is at the least a prima facie showing that the union represented a majority of the employees within a year of the change in ownership, it must be presumed that the union's status continued beyond the change-over.

Finally, the company did not indicate a good faith doubt in its response to the union's demand that Bachrodt honor the agreement. It said only that it had no obligation to bargain because of the purchase of some of Zimmerman's assets and that it had no "knowledge" that the union represented a majority of the employees. That position is not tantamount to a good faith doubt.

III

The Board, assuming that the successorship doctrine mandates an employer to take over responsibilities under the collective bargaining agreement of his predecessor, ordered that Bachrodt abide by the terms of the Zimmerman agreement and make restitution for any contractual benefits previously withheld. *Burns* overturned the premise upon which that order was based, holding that assumption of the pre-

existing contract was not an automatic consequence of successor status. Indeed, *Burns* sets up the opposite presumption. In cases, such as the instant one, in which successorship is triggered by the fact that the employer's "operational structure and practices" remain the same and that a majority of those employed in the bargaining unit are retained, 40 U.S.L.W. at 4501, the successor business is not required to honor the existing collective bargaining agreement.[3] Thus, that part of the Board's order which required that the respondent abide by the previous agreement and grant restitution for its past failure to do so cannot stand.

IV

The Board's holding that Bachrodt's unilateral alterations in the working conditions of its employees constituted an unfair labor practice and its requirement that Bachrodt make restitution for any benefits which may have been lost by dint of such changes is supportable under the tests of *Burns*. The critical question in *Burns* relates to the timing of these changes—whether they predated or postdated the commencement of the duty to bargain. Once the duty to bargain is triggered, a successor employer's responsibilities are akin to those of an ordinary employer prior to the negotiation of a formal labor contract but after a bargaining representative has been selected when he has the duty to bargain and, the

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[3] This is not to suggest that there are no cases in which an employer is bound to accede to the previous agreement. *Burns* specifically recognizes several situations in which the Board may find that the successor has in fact assumed his predecessor's contractual obligations. 40 U.S.L.W. at 4505.

corollary duty, not to institute changes without consulting the union. In the successor situation this generally means that a successor employer can set the initial terms upon which rehiring is conditioned since prior to the rehiring of a substantial proportion of his predecessor's employees there is no duty to bargain. The only instance in which the duty to bargain may precede the formal rehiring of employees is where, as *Burns* states, "[I]t is clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 40 U.S.L.W. at 4506. In *Burns*, the duty to bargain did not mature until late June, at the point when it became clear that the successor had hired the requisite complement of his predecessor's employees. However, the Court rejected the union's challenge to some of the changes in working conditions unilaterally instituted by *Burns* since they had been incorporated in the initial employment contracts and thus necessarily predated the duty to bargain.

Bachrodt presents a different situation since it appears that the contested changes in working conditions had not been a part of the initial terms of rehiring. The trial examiner found that Bachrodt's job applications were distributed to all of Zimmerman's employees on November 7. Bachrodt's testimony suggests that, after brief individual interviews, he gave assurances to each employee that he would be rehired. In any event, it is clear that all those who had received applications on Friday appeared for work on Monday, with the exception of two who did not return the applications. The trial examiner

then found that the only changes in working conditions from those instituted by Zimmerman were the changes announced by Bachrodt at a meeting with employees held on Monday.

It is apparent from all accounts that as of November 7 Bachrodt planned "to retain all of the employees in the unit" and at such time, "it was appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *Burns, supra* at 4506. Moreover, even were we to look only to when the contracts for rehire were formally consummated, the announced changes must have followed the formal rehiring. There is nothing to indicate that the employees were aware of the proposed changes on November 7. Nowhere were they told that they were to accept them or not appear for work on Monday. Indeed, from the proffered testimony, the impression conveyed at the November 7 meeting was precisely the opposite. Hence, we affirm the Board's holding that Bachrodt's actions amounted to an unfair labor practice since they were in derogation of an existing duty to bargain and the Board's order requiring restitution for losses sustained.[4]

At first blush it might seem that this determination is tantamount to a requirement that Bachrodt honor the existing collective bargaining agreement and that the same relief is being afforded by indirection that *Burns* directly forecloses. Further analysis

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[4] The General Counsel notes in his supplemental brief that the changes, according to the company, were either improvements or not implemented, which, if true, would not obligate the company to make any restitution to employees under the Board's order.

proves otherwise. Bachrodt is free to alter unilaterally the terms and conditions of employment but only under certain conditions. Those conditions are that the company first bargain with the employees' representative and that the bargaining continue to an impasse; only then would Bachrodt be in a position to change the working conditions by unilateral action. A fair reading of *Burns* supports this conclusion.

The Board's order, except insofar as it requires the respondent to abide by the collective bargaining agreement executed between Zimmerman and the union, will be enforced.

STEVENS, *Circuit Judge,* dissenting in part. The court holds that Bachrodt committed an unfair labor practice on Monday, November 10, 1969, when he entered into employment arrangements with Zimmerman's former employees on terms and conditions which differed from those which had been in effect when Zimmerman owned the business. There are three distinct theories which might support the holding.

I.

As a successor to Zimmerman, Bachrodt might have been bound by the terms of his predecessor's labor contract. This was the theory of the trial examiner and the Labor Board. In the light of the Supreme Court's opinion in *N.L.R.B.* v. *Burns International Security Services, Inc.*, 40 U.S.L.W. 4499, 4506, (U.S. May 15, 1972), however, the Board has now abandoned that theory. Accordingly, Bachrodt

did not succeed to Zimmerman's *contract* obligations and was free to set new terms when he hired his own personnel after purchasing the automobile agency.

II.

As the new owner of the business, Bachrodt might have hired his employees on Zimmerman's terms, then, after a duty to bargain with the union arose, changed those terms without consulting the union. That, however, is not what happened.

Bachrodt's purchase from Zimmerman was closed on Monday, November 10, effective as of midnight on November 9.[1] Prior to the closing the relevant personnel were employees of Zimmerman. On Monday, the first day he owned the business, Bachrodt held a meeting of the employees and explained how the conditions of his operation would differ from Zimmerman's. True, Zimmerman had advised his employees of the pending transaction on the preceding Thursday, and Bachrodt passed out applications for employment on Friday,[2] but he did not hire any of Zimmerman's employees until after he became the

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[1] A. 198.

[2] "Q. When Bachrodt Chevrolet took over on November 10th, what if anything did you do with regard to the men who had worked for Zimmerman with regard to taking applications or anything else? Just tell us what you did that day.

"A. Before we took the place over we handed out applications to everybody. They were filled out and turned back into us, and at that time we looked over each and then each man was interviewed. We decided whether [to] hire them, or they could make a decision on whether they wanted to work for me." A. 143.

owner of the business on Monday.[3] Since Zimmerman's labor contract was not binding on Bachrodt as a successor, it is therefore clear that the initial employment relationship between Bachrodt and the former employees of Zimmerman was created on Monday, November 10.

Bachrodt's duty to bargain arose *as a result* of the employment of a sufficient number of union members on Monday, November 10. The creation of a bargaining relationship does not in itself impose any contractual obligations upon either party. Since Bachrodt had no obligation of any kind either to the union or to its members until after they became his employees, the duty to bargain cannot have limited Bachrodt's right to fix the initial terms of employment of the personnel he hired on November 10.[4]

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[3] The general counsel never contended otherwise. All of his exhibits use November 10, 1969, as the starting date for Bachrodt's employees. See G.C. Ex. 13, 14, and 15 (A. 192-94).

[4] As in *Burns*, it was not clear until after Bachrodt hired his full complement of employees that he had a duty to bargain with the union. Accordingly, the Court's language squarely fits this case:

> "It is difficult to understand how Burns could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to July 1, no outstanding terms and conditions of employment from which a change could be inferred. The terms on which Burns hired employees for service after July 1 may have differed from the terms extended by Wackenhut and required by the collective-bargaining contract, but it does not follow that Burns changed *its* terms and conditions of employment when

III.

Finally, as the prospective owner of the business, Bachrodt might have been under a duty to bargain with the union *before* he hired any of Zimmerman's former employees; under this theory the *initial* terms of employment could not be set without either the union's consent or a bargaining impasse.

In a dictum toward the end of this opinion in *Burns*, the Supreme Court posited a hypothetical situation in which "a successor employer," though not bound by his predecessor's labor contract, might nevertheless be under a duty to "consult with" the union before he fixes the initial terms of employment.[5] Whether this obligation to "consult" is the equivalent of an obligation to bargain to impasse is not entirely clear; assuming that it is, however, I do not believe this rather routine purchase of an automobile agency is the kind of exceptional situation the Court envisioned by its dictum.

Ordinarily, as the Court makes clear, a successor employer is "free to set initial terms on which it will hire the employees of a predecessor."[6] The public

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it specified the initial basis on which employees were hired on July 1." *N.L.R.B.* v. *Burns Int'l Security Servs., Inc.*, 40 U.S.L.W. 4499, 4506.

[5] "Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *Ibid.*

[6] *Ibid.*

interest in preserving this freedom for a new owner provided the underlying rationale for the Court's rejection of the Board's contention that the successor was bound by the terms of his predecessor's labor contract.[7] Nevertheless, the Court did opine that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."[8] As I read that comment in the context of the entire *Burns* opinion, I cannot conclude that this is the kind of a case in which the Court intended to require a new owner to come to terms—or to reach a bargaining impasse—with the union in advance of closing.

I recognize that a portion of the Court's dictum seems to fit this case. Since Bachrodt did pass out job applications to all of Zimmerman's employees on the Friday before the closing and since he hired almost all of them on Monday, a finding that he had planned to retain all of the employees in the unit might be proper. But no such finding was made by

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[7] "A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital." *Id.* at 4504.

[8] *Id.* at 4506.

the trial examiner or the Board, and I do not consider it "perfectly clear" that such a finding should have been made.

Prior to the closing, Bachrodt made no commitment to anyone that all, or indeed any, of Zimmerman's employee's would be retained. Bachrodt obviously intended to integrate the Freeport agency into his Rockford operation, and to specify different terms of employment than Zimmerman's. Whether the Zimmerman employees would accept those new terms could not be known until after they were explained on Monday; which of those employees Bachrodt would finally decide to hire could not be known until after each was interviewed. There is no evidence that any employee was essential for the continued operation of the business.

As I read the Court's dictum in *Burns*, it must have been "perfectly clear" *prior to the closing* that all employees in the unit would be retained. Otherwise it would not be "appropriate"—to use the Court's word—to saddle the new owner with any duty to bargain, or even to consult, with the union before setting initial terms of employment. The employment of union members *after* the closing may properly give rise to a duty to bargain with the union concerning subsequent changes from the initial terms of employment; I do not believe, however, that such post-closing hiring may retroactively establish a pre-closing duty to bargain.

In short, I consider the brief excerpt from *Burns* as positing a narrow exception from the ordinary situation in which the successor has complete freedom to set initial terms; I regard this case as one

involving an ordinary purchase transaction in which the new owner should not be penalized because he in fact provided jobs for substantially all of his predecessor's employees.

In my opinion none of the three theories which might support the conclusion that Bachrodt committed an unfair labor practice by setting new terms or conditions when he acquired the business is tenable. The majority agrees that the contract did not survive, but concludes that either Bachrodt's duty to bargain arose before Monday, November 10, or that the terms he set on that day changed some preexisting arrangement with the employees. In support of this conclusion Part IV of Chief Judge Swygert's opinion reads *Burns* as drawing an important distinction between a requirement that Bachrodt honor his predecessor's contract and a lesser requirement that he merely honor it until the union agrees to change it or his efforts to persuade the union to do so have reached the point of impasse.

As a practical matter I wonder how much difference there is between a holding that the new owner is bound by the terms of the old contract, and a holding that he is bound only until he has bargained to impasse with the union. No doubt there are cases in which the impasse date would arise much sooner than the contract expiration date, but in my judgment the time interval between those dates is not critical importance in evaluating the policy factors involved. What is most important—and I believe *Burns* makes this clear—is the new owner's position at the time he takes over the acquired business. In the normal situation the *Burns* holding encourages the transfer

of capital by freeing the purchaser of any obligation to the union, either contractually or in the form of a duty to bargain, until after a new complement of employees has been hired. The *Burns* decision, in effect, finds greater public benefit in preserving the successor's ability to make immediate operating changes than in affording maximum job security to the employees of the purchased business. If only the time interval between the impasse date and the expiration date of a pre-existing contract were on one side of the balance, it certainly would not have outweighed the interests of the employees in clearly defined job security.

Since I believe that Part IV of Chief Judge Swygert's opinion does not give proper effect to the underlying rationale of *Burns*, I respectfully dissent from that part of his opinion.

APPENDIX G

186 NLRB No. 151

D—4518
Freeport, Illinois

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 38-CA-811

BACHRODT CHEVROLET CO.

and

LODGE 1096, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO.

DECISION AND ORDER

On July 17, 1970, Trial Examiner Harold X. Summers issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief,[1] and the General Counsel filed a brief in support of the Trial Examiner's Decision, and also filed limited exceptions thereto and a supporting brief.

[1] The Respondent has requested oral argument. The request is hereby denied inasmuch as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings,[2] conclusions, and recommendations of the Trial Examiner as modified herein.

The Trial Examiner found, and we agree, that the Respondent, as of November 10, 1969, took over and operated the predecessor's body shop as an integral

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[2] We find without merit the Respondent's allegations of bias on the part of the Trial Examiner. There is no basis for finding that bias or partiality existed only because the Trial Examiner resolved important factual conflicts in favor of General Counsel's witnesses. As the Supreme Court has stated, ". . . [T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." *N.L.R.B.* v. *Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949). Moreover, as it is the Board's established policy not to overrule a Trial Examiner's resolutions as to credibility except where, as is not the case here, the clear preponderance of all the relevant evidence convinces us that the resolutions were incorrect, we find, contrary to the Respondent's contention, no basis for disturbing the Trial Examiner's credibility findings. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3).

For the reasons set out in the dissenting opinion in *William J. Burns International Detective Agency, Inc.* 182 NLRB No. 50, Member Jenkins would not require the Respondent here to be bound by the agreement between the predecessor employer and the Union.

part of its operations and that the employees working therein were among its employees.[3] We further find, however, that, assuming, *arguendo*, the Respondent did not purchase the body shop from the predecessor employer, its status as a successor employer would not have been affected because elimination of the body shop was not sufficient to affect the Union's status as bargaining representative. In so finding, we note that the record clearly shows that the Respondent took over 22 of the 23 or 24 employees in the bargaining unit, including the 6 in the body shop. Thus, it follows that, even without the latter 6, the Respondent would have still retained 16 of the predecessor employer's 23 or 24 employees.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and

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[3] Although the Trial Examiner found that, on or about November 15, 1969, the Respondent ceased to operate the predecessor employer's body shop and that these employees were taken over by an entity completely unconnected with the Respondent, he nevertheless included "bodymen" and "body shop" in his redefined unit description. Accordingly, we shall delete such words from the unit description and the third conclusion of law. *The correct unit description is as follows*:

> All full-time and regular part-time employees in Respondent's service department (for example, mechanics and their helpers and apprentices, wash boys, car jockeys, errand boys, and janitors), but excluding sales, parts, and office employees, and further excluding the manager and assistant manager of the service department and all other supervisors within the meaning of the Act.

hereby orders that the Respondent, Bachrodt Chevrolet Co., Freeport, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order as so modified.

Dated, Washington, D.C. Dec. 3, 1970.

John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX D

TDX—387—70
Freeport, Ill.

UNITED STATES OF AMERICA
BEFOR THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Case 38-CA-811

BACHRODT CHEVROLET CO.
Respondent

and

LODGE 1096, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
Charging Party

James B. Ruyle and
Milford R. Limesand, Esqs.,
for the General Counsel.

Miller, Hickey, Collins &
Close, of Rockford, Ill.,
by Francis E. Hickey and
Henry J. Close, Esqs., for
the Respondent.

Kenneth W. Black, Grand Lodge
Representative, of Des Plaines,
Ill., for the Charging Party.

TRIAL EXAMINER'S DECISION

HAROLD X. SUMMERS, Trial Examiner: In this proceeding, the General Counsel of the National

Labor Relations Board (herein called the General Counsel and the Board, respectively) issued a complaint [1] alleging that Bachrodt Chevrolet Co.[2] (herein, Respondent) had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). The answer to the complaint admitted some of its allegations, denied others, and disclaimed knowledge as to still others; in effect, it denied the commission of any unfair labor practices. Pursuant to notice, a hearing was held before me at Freeport, Illinois, on April 15, 1970; all parties were afforded full opportunity to call and examine and to cross-examine witnesses, to argue orally, and thereafter to submit briefs.

Upon the entire record in the case, including my evaluation of the witnesses based upon my observation of their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is an Illinois corporation with office and place of business located at Freeport, Illinois, where it has been engaged, on and since November 10, 1969, in the business of the retail and wholesale

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[1] The complaint was issued on February 12, 1970. The unfair labor practice charge initiating the proceeding—wherein the charged party was named as "Sunnyside Motors," a name formerly used by Respondent—was filed on November 21, 1969. The answer admits that the charge, addressed to Sunnyside Motors, was served on Respondent.

[2] This name is as corrected by amendment at the hearing. The caption of the case is hereby amended to read as above.

selling and servicing of automobiles, parts, and accessories. Respondent has a reasonable expectation of sales and service the gross income from which will exceed $500,000 per year, including the year commencing November 10, 1969; and of the annual purchase and receipt of automobiles and trucks of a value in excess of $50,000 which will be transported to the Freeport facility directly from States other than the State of Illinois.

Respondent is an employer engaged in commerce within the meaning of the Act.

II. The Union

The Charging Party, Lodge 1096, International Association of Machinists and Aerospace Workers, AFL-CIO (herein called Lodge 1096), is an organization in which employees participate and which exists for the purpose, in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of work. I find that it is a labor organization within the meaning of the Act.

III. The Alleged Unfair Labor Practices

A. Background and Setting

During 1955 (and for an unspecified period prior thereto), the premises now occupied by Respondent were occupied by a Chevrolet dealer, George M. Monroe, doing business as Monroe Chevrolet Sales (hereinafter referred to as Monroe). On September 9, 1955, the then mayor of Freeport conducted an elec-

tion among certain employees [3] of Monroe to determine whether or not they wished to be represented in collective bargaining by Lodge 1096. A majority of the votes cast—7 to 3 in an electorate of 10—voted in favor of such representation. Thereafter, the working conditions of these employees were fixed by a series of collective-bargaining agreements between Monroe and Lodge 1096. The first such agreement was a 2-year contract, effective by its terms from November 4, 1955, to November 4, 1957. Subsequently, there were 1-year contracts or extensions thereof; one or another contract or extension thereafter covered the entire period of Monroe's further existence.

In the summer of 1960, Zimmerman Chevrolet, Inc. (herein, Zimmerman), took over from Monroe, and, thereafter, there were a series of collective-bargaining agreements between Zimmerman and Lodge 1096. Each of these agreements, by its terms, was a 1-year contract calling for an automatic year-to-year extension in the absence of notice to the contrary by one or the other of the parties.

The last such contract, the parties to which were Lodge 1096 on the one hand, and Zimmerman, "its successors and assigns," on the other, became effective, by its terms, on February 8, 1968, and was to remain in force.

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[3] According to the collective-bargaining contract which eventuated—see infra—the employees involved in the election consisted of

> [A]ll employees of [Monroe] with the exception of office employees, supervisory employees, and salesmen.

> Until February 8, 1969, and thereafter from year to year unless written notice is given by either party hereto to the other on or before sixty (60) days prior to the 8th day of February, or sixty (60) days prior to the 8th day of February of any subsequent year.

Prior to the "notice" date stipulated in this agreement—i.e., 60 days before February 8, 1969—Zimmerman's employees met to consider what changes, if any, they would seek in the ensuing contract, but they decided to ask for none. Thereafter, neither Lodge 1096 nor Zimmerman gave any written 60-day notice, and (I find) the contract automatically renewed itself for one year on February 9, 1969.

Enter Respondent

Around the middle of August 1969, Robert Zimmerman, president of Zimmerman, was awarded a Ford dealership franchise in Cedar Rapids, Iowa, and he became interested in disposing of his Freeport Chevrolet operation.

One of Zimmerman's competitors for a number of years prior to the period with which this case is concerned was Lou Bachrodt Chevrolet Co., an Illinois corporation located at Rockford, Illinois, approximately 30 miles from Freeport. Louis Bachrodt was its president and managing agent, and, at least since 1963, his son, Louis C. Bachrodt III, was associated with the enterprise on a full-time basis.

Robert Zimmerman and Louis Bachrodt III met on or about September 10, 1969, for a preliminary discussion about the sale of the Zimmerman operation. The ensuing negotiations culminated, on Oc-

tober 20, in an agreement, which agreement was memorialized by a "Buy and Sell Agreement" between Zimmerman ("Seller") and Lou Bachrodt Chevrolet Co. ("Buyer") dated October 28.

The Agreement, among other things, called for the sale to Buyer of Seller's new and demonstrator automobiles and trucks on hand or on order, new parts and accessories which met specified standards, miscellaneous inventories of usable materials, machinery and shop equipment, and miscellaneous usable supplies—all at prices the method for establishing which were set forth. Leases on all Seller's properties were described, and Buyer agreed, as of the date of transfer of possession, to take over the liabilities thereunder. Work in process at the time of transfer of possession was to be completed by Buyer at Seller's expense. Provisions were included for the prorating of taxes, insurance, and other items. And Seller agreed that, for a period of 5 years, neither it nor its president would engage in the operation of an automobile dealership in the county in which Freeport was located.

The transfer of title to and the delivery of possession of assets were to take place on or before November 10, and payment of the total purchase price was to be made no later than November 30.

Under the terms of the Agreement, Seller was to provide a copy of each contract or labor agreement to which it was party,[4] but (it was specified) Buyer was to assume no obligations thereunder except as to the current classified telephone directory contract;

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[4] Bachrodt was in fact shown a copy of the latest collective-bargaining agreement between Zimmerman and Lodge 1096.

a contract under which automated inventory services were received; a pension plan between Seller and its employees, underwritten by a named insurance company; the current employees' group life and health insurance plan, underwritten by another insurance company; and the current uniform-laundering service contract.

By specific provisions in the Agreement, no used cars or trucks were intended to be sold thereby; nor were Seller's accounts payable [5] or accounts receivable.[6] There was no mention of "good will" in the Agreement; nor was there any undertaking by Buyer to "take over" Seller's employees.

The entire transaction, by its terms, was made subject to approval by the Chevrolet Motor Division of General Motors Corporation and to the grant to Buyer "or its nominee" of an exclusive franchise for the sale of Chevrolet Motor Division products in Freeport.

The Buy and Sell Agreement having been executed, the parties thereupon took steps looking toward its implementation. Prior to November 10, Lou Bachrodt Chevrolet Co. designated as its nominee in the transaction a new entity then to be known as "Sunnyside Motors," headed by Louis Bachrodt III; Robert Zimmerman began moving the used vehicles to Iowa; and,

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[5] Except for *notes* payable on new cars, allowances for which had been made in the price formula.

[6] Buyer undertook to accept payments on sums due Seller for a period of 90 days after the transfer date and to deposit the funds to Seller's credit. Also, Buyer undertook to furnish space and facilities, for the 90-day period, to an employee of Seller for the purpose of servicing Seller's remaining accounts.

assurances of the receipt of a dealership franchise having been given the new operation, the final steps leading to the transfer of assets were taken.

On Thursday, November 6, Robert Zimmerman called his employees together and informed them of the change in ownership which would take place over the weekend. Next day, representatives of the new agency passed out job application forms among Zimmerman's employees, inviting them to file for employment.

Zimmerman's last day of operation was Saturday, November 8. Respondent, under the name "Sunnyside Motors," began its operating existence on Monday, November 10; and, on the same day, it released a publicity statement concerning the change. That morning, sales and service operations were performed by employees of the new entity, and new promotional material and billheads and other stationery were installed.

By Wednesday, November 12, "Sunnyside Motors" had become "Bachrodt Chevrolet Co.," and application for a corporate charter was filed.[7] Since that date, Respondent, with Louis Bachrodt III as its president, managing head, and principal stockholder, has operated under its present name.

C. Sequence of Events Surrounding Respondent's Takeover

As Respondent began operations on November 10, it performed the same functions, at the same loca-

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[7] The charter was issued several weeks later.

tions,[8] as Zimmerman had on Saturday the 8th. Although there was a complete turnover among top management and although internal record-keeping systems were overhauled, Respondent retained Zimmerman's sales manager and four of its five salesmen, the only one of Zimmerman's clerical employees alluded to in this record, and its parts department employee. As for the employees with whose bargaining rights this case is concerned, Respondent employed 17 individuals in its service department proper (including the service manager and his assistant) and 8 individuals in the body shop (including the shop manager and his assistant), all of whom had most recently been employees of Zimmerman.[9]

As for employee working conditions in the Respondent's operation on and after November 10, they were the same as those prevailing under Zimmerman, with the exceptions noted hereinbelow.

But, meanwhile, an exchange of correspondence was taking place. Agents of Lodge 1096 had become aware of the imminence of an alteration in the dealership on or about November 7. On that date, they sent a letter to Lou Bachrodt III:

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[8] The main offices and showroom at 101 West Spring Street, with service parking lot and used car lot; a new car storage lot on the west side of Freeport; the "bullpen" on Jackson Street, for parking older used cars being reconditioned and on which was a parts warehouse; and the body shop on Southwest Avenue.

[9] All but one or two of Zimmerman's employees had filled out applications for employment with Respondent, and all who had applied were hired.

Mr. Lou Bachrodt III
Lou Bachrodt Chevrolet
2000 Christina
Rockford, Illinois 61100

Dear Mr. Bachrodt:

It is our understanding, based on our talk with Mr. Robert Zimmerman this morning, that you are assuming ownership of this automobile agency this coming Monday, November 10, 1969.

In view of the fact that Zimmerman's Chevrolet Sales has an existing labor agreement with Lodge No. 1096, International Association of Machinists and Aerospace Workers (AFL-CIO), which is in effect until February 8, 1970, we are hereby advising you that it is our position that said labor agreement, in all its terms and provisions, is equally binding on you as it was on Mr. Robert Zimmerman.

Be further advised that we are prepared to meet with you, as soon as possible, to review with you whatever sections and/or articles of said labor agreement on which you may have questions. Your kind attention in this matter is sincerely appreciated.

With best wishes for a continuing good relationship, we are

Yours truly,

/s/ Dominic F. Berta
Dominic F. Berta
Special Representative

/s/ Lloyd A. White
Lloyd A. White
Business Representative

They received a reply dated November 10:

International Association of Machinists
Freeport Lodge No. 1096
225 West Main Street
Freeport, Illinois 61032

Attn: Mr. Dominic F. Berta
Mr. Lloyd A. White

Re: Zimmerman Chevrolet, Inc.

Gentlemen:

This office represents Mr. Louis Bachrodt, III to whom you addressed a letter on November 7, 1969 with regard to your conversation with Mr. Robert Zimmerman of Zimmerman Chevrolet, Inc.

Mr. Louis Bachrodt, III did not assume ownership of Robert Zimmerman's Automobile Agency on November 10, 1969.

However, I do wish to advise you that Lou Bachrodt Chevrolet Co., an Illinois corporation, did purchase some of the assets of Zimmerman Chevrolet as of November 10, 1969. Under the terms of the purchase agreement, Lou Bachrodt Chevrolet Co., did purchase certain physical assets and stock of parts and accessories of Zimmerman Chevrolet, Inc. Lou Bachrodt Chevrolet Co. did not purchase any accounts receivable nor any used car inventory. Lou Bachrodt Chevrolet did not assume any debts or liabilities of Zimmerman Chevrolet Co. and specifically did "not assume any of the obligations of any labor agreements." Lou Bachrodt Chevrolet Co. does not know if any of the former employees of Zimmerman Chevrolet, Inc. are represented by the In-

ternational Association of Machinists or any other union, and, accordingly, can not, therefore, enter into collective bargaining negotiations with your union or any other union at this time.

Very Truly yours,

/s/ Francis E. Hickey
Francis E. Hickey
for
Miller, Hickey, Collins & Close

Thereupon, on November 12, Lodge 1096 sent the following letter:

Mr. Francis E. Hickey, Attorney
Miller, Hickey, Collins & Close
Rockford News Tower
Rockford, Illinois 61104

Re: Zimmerman Chevrolet, Inc.

Dear Mr. Hickey:

Your letter of November 10, 1969 to the undersigned did not give us the answer to the question and statement we made in our letter to Mr. Louis Bachrodt on November 7, 1969.

We again state to you very clearly that Mr. Bachrodt did, in fact, take over and is presently operating the business Mr. Zimmerman disassociated himself from as of 12:00 midnight on November 9, 1969. We further request that Mr. Bachrodt to meet with us in regard to the existing labor agreement.

We further ask you, as the attorney for Mr. Bachrodt, to schedule a meeting with us, as soon as possible, to negotiate any and all matter pertaining to wages, rates of pay, hours of work

and other conditions of employment as they apply to our membership employed at your client's firm in Freeport, Illinois.

Your prompt attention in this matter is respectively requested.

Yours truly,

/s/ Dominic F. Berta
Dominic F. Berta
Special Representative

/s/ Lloyd A. White
Lloyd A. White
Business Representative

which, in turn, brought the following response dated November 14:

International Association of Machinists
Freeport Lodge No. 1096
225 West Main Street
Freeport, Illinois 61032

Attn: Mr. Dominic F. Berta
Mr. Lloyd A. White

Re: Zimmerman Chevrolet, Inc.

Gentlemen:

We acknowledge receipt of your letter of November 12, 1969 with regard to the above matter.

In my letter addressed to you on November 10, 1969, I stated as follows:

> However, I do wish to advise you that Lou Bachrodt Chevrolet Co., an Illinois corpora-

tion, did purchase some of the assets of Zimmerman Chevrolet as of November 10, 1969. Under the terms of the purchase agreement, Lou Bachrodt Chevrolet Co. did purchase certain physical assets of stock of parts and accessories of Zimmerman Chevrolet Inc. Lou Bachrodt Chevrolet Co. did not purchase any accounts receivable nor any used car inventory. Lou Bachrodt Chevrolet did not assume any debts or liabilities by Zimmerman Chevrolet Co. and specifically did not "assume any of the obligations of any labor agreements."

May we emphasize that Lou Bachrodt Chevrolet Co. did not "take over and is presently operating the business Mr. Zimmerman disassociated himself from as of 12:00 midnight November 9, 1969."

I regret to inform you that Lou Bachrodt Chevrolet does not propose to meet with your union to negotiate any and all matters regarding wages, rates of pay, etc. Lou Bachrodt Chevrolet Co. does not know of its own knowledge if any of the former employees of Zimmerman Chevrolet, Inc. are represented by the International Association of Machinists or any other union. Should you be of the opinion that the employees of Lou Bachrodt Chevrolet Co. in Freeport do desire to be represented by your union or any other union, there is an orderly procedure established by the National Labor Relations Act for an election to determine what union, if any, the employees wish to be represented by in collective bargaining negotiations.

Very truly yours,

/s/ Francis E. Hickey
for
Miller, Hickey, Collins & Close

Meanwhile, at a meeting with employees held on Monday, the 10th, Bachrodt III announced the installation of a number of working conditions which differed from those which Zimmerman had applied to its employees:

(1) Respondent (he said) was adopting a new method of computing *wages of service department mechanics*, who worked on an incentive basis. Whereas, irrespective of the length of time a mechanic worked on a job, Zimmerman had paid him 50 percent of the labor cost per hour ($8) charged the customer for the number of hours ascribed to the job in the so-called "Chevrolet manual," Respondent, under its newly-installed plan, would pay him a flat $3.75 per hour, for the number of hours that the so-called "Chilton manual" assigned to the job.

(2) There would be a change in the method of computing the *mechanics' minimum per pay hour*: Under Zimmerman, each mechanic was guaranteed a minimum wage for hours actually worked based on 85 percent of his average hourly earnings during the previous calendar quarter; under Respondent, the guaranteed minimum would be an amount agreed upon between the individual mechanic and Respondent.

(3) Under Zimmerman, employees were permitted to take 2 hours off with pay on *Good Friday* after-

noon if they returned to work to finish out the day; under Respondent, it was announced, they could be off, with pay, for the 8 working hours between noon on Good Friday and noon next day.

(4) As for the amount of hourly pay given for *holiday* time off in general, under Zimmerman it had been based upon the employees average hourly pay for the past quarter; now, under Respondent, it was to be based upon the individual employee's guaranteed minimum, which, in turn—*supra*—was fixed by individual bargaining.

(5) *Saturday* morning work, voluntary under Zimmerman, was to be mandatory upon any individual assigned to work on a given Saturday.

(6) While the employees would receive *vacation* pay for work performed under Zimmerman, there would no longer be vactions with pay.

On or about November 15, another "change" occurred:

(7) Respondent ceased to operate the body shop. The shop itself, its operation, and its employees were taken over by Zimmerman Cadillac and Olds,[10] an entity completely unconnected with Respondent.

In connection with none of these changes did Respondent give advance notice to or engage in any consultations with Lodge 1096.

Time passed, and a number of changes took place in Respondent's work force. Subsequent to November 10, a new sales manager, a new office manager,

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[10] Run by a former officer of Zimmerman, but otherwise unrelated to that organization.

and a new service department manager and an assistant manager placed the ones inherited from Zimmerman. As earlier noted, the eight body shop employees (including supervisors) were transferred to another employer on November 15. Between November 10 and the date of the instant hearing, the employment of 9 of the 17 service department ex-Zimmerman employees was terminated. (No one was discharged for cause; one man was laid off; the rest either were given jobs at Lou Bachrodt Chevrolet of Rockford or voluntarily quit. Included among those who quit were the service manager and his assistant; the first position was filled by the promotion of one of the ex-Zimmerman mechanics, and the other was filled by Zimmerman's former parts department employee.) Only one individual was hired to replace those who had left. Therefore, as of the date of the hearing, Respondent had no body shop employees and had 10 service department employees, including the manager and his assistant.

D. Discussion—Conclusions

The General Counsel, regarding Respondent as the "successor" to Zimmerman in the "same employing industry," contends that Zimmerman's obligation to bargain with Lodge 1096 for the service department and body shop employees and its obligation to honor the last-executed contract covering their working conditions were inherited by Respondent; that Respondent's refusal to recognize and deal with Lodge 1096 as representative of such employees and its refusal to be bound by the contract constituted an unlawful refusal to bargain under the Act; and that its in-

stitution of certain changes in working conditions,[11] effectuated without notice to and consultation with Lodge 1096, constituted separate incidents of unlawful refusals to bargain.

(The General Counsel does not allege that Respondent, independently of the above conduct, interfered with, restrained, or coerced employees in the exercise of their self-organizational rights, or that it discriminatd with respect to any employees' working conditions to encourage or discourage union membership. He has presented no evidence to the effect that agents of Respondent entertained any animus against unions in general or Lodge 1096 in particular. Nor does he raise as an issue here any alleged breach of contract by Respondent *per se.*)

Respondent argues that, although it did purchase some of the assets of Zimmerman, it did not purchase others, such as the used cars and the accounts receivable, that it did not assume liability for Zimmerman's accounts payable, and that it did not purchase the body shop (which, allegedly, employed about one-half the individuals in the putative bargaining unit); therefore, it contends, it was not a "successor" to Zimmerman within the meaning of the relevant precedents. In addition, it defends its refusal to bargain with Lodge 1096 upon the grounds (1) that

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[11] Specifically, the method of computing mechanics' incentive pay per job, the manner in which the guaranteed minimum pay for each hour worked was now arrived at, the change in time off for Good Friday, the amount of hourly pay given for holiday time off, and the disposition of the body shop operation. The General Counsel does not attack Respondent's alteration of the voluntary nature of Saturday work or the elimination of vacation benefits.

it had no reason to believe that Lodge 1096 represented a majority of the employees in an appropriate bargaining unit and (2) that there is no evidence that that organization in fact represented any such majority.

The contention of Respondent that, despite its operation of the body shop for 5 days, it did not purchase that shop from Zimmerman—in counsel's words, the body shop "was sold directly by Zimmerman to Russell King [body shop manager and predecessor to or alter ego of Zimmerman Cadillac and Olds]"—bears upon two issues: (1) the composition of the appropriate bargaining unit here, and (2) the failure of Respondent to discuss with Lodge 1096 the "transfer-out" of the body shop operation. Therefore, the contention will be taken up at this time.

Counsel for Respondent represented that "Mr. Zimmerman was never clear with us, really. If you will read the Buy and Sell Agreement [you will see that] they hired two independent appraisers to come in and appraise the items. When they came in, as I understand it, the body shop was already sold or in the process of being sold by Zimmerman to King." And, noting that "we didn't end up with it," he points out that the bill of sale made no mention of the body shop.

Respondent's president testified that, in his negotiations with Zimmerman, "the whole body shop thing was a confusing issue"—he was "not sure" if the body shop was excluded from the sale; but he was "positive" that he did not buy the body shop and then sell it to King. Asked if, during the negotiations, he had any reservations, mental or otherwise, about

the fact that the body shop was included in the transaction, he replied in the affirmative: during the discussions, "it was understood" that Russell King, then body shop manager, was trying to raise money to buy the operation—Respondent was "in the middle." In fact, he testified, Respondent's takeover on November 10 "might have been more of a convenience to Bob Zimmerman than to anybody. . . . At that time Bob and I had severed negotiations as far as the body shop was concerned, because I had to be in a position to say, 'Bob, go ahead and sell the body shop.' "

The Buy and Sell Agreement covers, among many other things, "body and paint materials," and all equipment located "at the body shop" as well as elsewhere. The described leases—which Seller represented to exist and which Buyer agreed to assume—included the month-to-month lease "on the body shop." As for the provision concerning work in process—*supra*—there was no exclusion of body work; nor was the body shop excluded in any other provision in which an exclusion would normally be found if indeed there was any such understanding—for example, in the warranty against title-clouds.

Moreover, in its correspondence with Lodge 1096 extending from November 7 through 14. Respondent, disclaming successorship to Zimmerman in other respects, made no representation that it had not taken over the body shop operation.

As a matter of fact, it did, on the 10th, take over the operation, as above described. It billed work done in its own name. Insofar as the public was concerned, it continued to operate the body shop along with other ex-Zimmerman operations.

Yet, it gave up the shop 5 days later. And (although the body shop is neither included in nor excluded from the bill of sale), the credited testimony demonstrates that Respondent never paid Zimmerman for the operation. Since November 15, Respondent has neither offered to perform nor has it performed body work on a retail basis.[12]

The explanation, it seems to me, is simple: During the discussions leading up to the execution of the sales agreement, Bachrodt's attention was called to the fact that Body Shop Manager King wanted to buy the shop and was trying to acquire the necessary capital; Bachrodt, whose desire for the dealership was not necessarily conditioned upon his acquisition of this part of the operation, orally agreed to take or not to take the body shop depending upon King's success in raising funds; and, on November 10, King not yet successful, Respondent took over the body shop along with the rest of the assets purchased, in accordance with the terms of the Buy and Sell Agreement. But no appraisal of properties had yet been made, and no price set, when Zimmerman informed Respondent that the sale to King was now ready for consummation, and Respondent honored Bachrodt's prior (verbal) agreement to turn over the operation. Thus, we account for the "confusion" during the negotiations, Respondent's take-over and subsequent transfer-out, the fact that Respondent did not pay Zimmerman for the body shop (and was not paid by King for it), and the failure of the bill of sale (executed December 26) to mention it.

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[12] Since November 15, body work on new cars covered by warranty has been sent to other body shops, and the charges have been transmitted to the Chevrolet Motor Division.

I find, therefore, that as of November 10, 1969, Respondent took over and operated Zimmerman's old body shop as an integral part of its operation and that the bodymen working at the shop were among its employees.

There is no real dispute as to the composition of a unit of employees appropriate for purposes of collective bargaining. The complaint describes that unit as consisting of

> All mechanics, bodymen, helpers, apprentices, lubrication men, washers, common laborers, janitors, errand boys, and all other employees under the supervision of the service manager employed at Respondent's Freeport, Illinois facility, excluding office employees, salesmen, and all other employees, and all supervisors as defined in the Act,

a description which is obviously an updated version of that which appears in the collective-bargaining agreement which (I have found) renewed itself for one year on February 9, 1969, which description itself is an updated version of the one which served to describe the body of eligible voters in the 1955 election among Monroe's employees. Respondent, in its answer, denied the appropriateness of said unit, the denial being based on assertions that (1) there had been no Board finding that such a unit of *Respondent's* (as opposed to Monroe's or Zimmerman's) employees was appropriate, and (2) the description included the bodymen whereas Respondent has no bodymen.

On the basis of the testimony herein, in the light of the stipulations and concessions of the parties, and

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leaving aside for the moment the obligation of Respondent to bargain with Lodge 1096 as representative of such a group, I find that the unit described by the complaint is in fact appropriate for collective-bargaining purposes; and it is only for the sake of further clarity that I here redefine the unit which I find to be appropriate:

> All fulltime and regular parttime employees in Respondent's service department (for example, mechanics and bodymen and their helpers and apprentices, wash boys, car jockeys, errand boys, and janitors) but excluding sales, parts, and office employees and further excluding the manager and assistant manager of the service department and of the body shop and all other supervisors within the meaning of the Act.

This is another of those cases which involve the question of whether or not, upon a change of ownership, there is a "substantial continuity of the employing industry." Clearly, in this matter—where the successor employer continued to operate in the same business as its predecessor, with substantially the same work force [13]—there was such a continuity; and clearly, in such a situation, the successor employer steps into the shoes of its predecessor with respect to the bargaining obligation created by the

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[13] Respondent took over all but one of Zimmerman's supervisors, all of its salesmen, its parts man, and 22 of the 23 or 24 employees in the bargaining unit—a figure which includes the 6 nonsupervisory bodymen. Respondent introduced evidence of subsequent changes; but these changes, such as might have been made had Zimmerman continued to operate the business, do not affect the legal picture as of the time of takeover.

Act.[14] Zimmerman had been obligated to bargain with Lodge 1096 as its employees' agent at the time of the transfer;[15] now, I find, Respondent was likewise obligated.[16]

In sum, I find and conclude that Respondent, in failing and refusing to recognize and to bargain with

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[14] *N.L.R.B.* v. *Albert Armato and Wire & Sheet Metal Specialty Co.*, 199 F.2d 800 (C.A. 7); *N.L.R.B.* v. *Lunder Shoe Corp.*, 211 F.2d 284 (C.A. 1); *N.L.R.B.* v. *Blair Quarries, Inc.*, 152 F.2d 25 (C.A. 4); *N.L.R.B.* v. *Zayre Corp.*, —— F.2d —— (C.A. 5, April 27, 1970), 74 LRRM 2084; *N.L.R.B.* v. *Kiddie Kover*, 105 F.2d 179, 188 (C.A. 6); *N.L.R.B.* v. *McFarland*, 306 F.2d 219 (C.A. 10); *Cruse Motors, Inc.*, 105 NLRB 242; *Johnson Ready Mix Co.*, 142 NLRB 437; *Payless Drug Stores*, 150 NLRB 518; *Randolph Rubber Co., Inc.*, 152 NLRB 496.

[15] *Shamrock Dairy, Inc.*, 119 NLRB 998, 1000-02.

[16] Respondent denied the allegation in the complaint that Lodge 1096 had been and still was the representative of the involved employees. In view of the existence of the latest—unexpired—collective-bargaining contract, I find that it was. *Shamrock Dairy, Inc., supra*; and *N.L.R.B.* v. *Armato, supra*, at 803: "There is no reason to believe that the employees will change their attitude merely because the identity of their employer has changed." Also, see *Valleydale Packers, Inc.*, 162 NLRB 1486, 1490-91, wherein the Trial Examiner, with Board approval, said that "a successor employer is obligated to bargain with a union which is the exclusive representative of the employees acquired from the predecessor, absent a reasonable and good-faith doubt that such union represents a majority of the employees [citing cases]. This is so whether such representative status is evidenced by a Board certification or by recognition and the existence of a collective-bargaining contract." Moreover, it should be noted here that, although Respondent contended that it entertained a good-faith doubt as to the majority status of Lodge 1096's representation claim, it offered no evidence in support of the contention.

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Lodge 1096 on and after November 10, 1970, unlawfully refused to bargain, and is refusing to bargain, within the meaning of the Act.

It followed and I find that, by changing certain working conditions—the method of computing mechanics' incentive pay per job, the manner of arriving at the guaranteed minimum pay for each hour worked, the number of hours' pay given for Good Friday time off, the amount of hourly pay to be paid for holiday time off, and the elimination of a portion of the bargaining unit by a transfer-out of the body shop [17]—without notice to or consultation with Lodge 1096, Respondent acted in derogation of its duty to bargain collectively within the meaning of the Act.

As for the General Counsel's allegation that Respondent's refusal to honor the unexpired collective-bargaining agreement was itself violative of the Act, a quartet of recently-issued Board decisions [18] is dispositive. In these cases, the Board, in reliance on the Supreme Court's expression in *John Wiley & Sons* v. *Livingston* [19] of the perspective in which a successor employer's obligations to honor the provisions of a collective-bargaining agreement negotiated by his predecessor must be viewed, established the principle that, absent unusual circumstances, the Act imposes upon a successor employer the obligation to

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[17] See *Martin Marietta Corporation*, 159 NLRB 905.

[18] *William J. Burns Detective Agency*, 182 NLRB No. 50; *Kota Division of Dura Corp.*, 182 NLRB No. 51; *Travelodge Corp., et al.*, 182 NLRB No. 52; and *Hackney Iron & Steel Co.*, 182 NLRB No. 53. Also, see *Ranch-Way, Inc.*, 183 NLRB No. 116 (decided June 26, 1970).

[19] 376 U.S. 543.

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take over and honor a collective-bargaining agreement negotiated on behalf of the employing enterprise by the predecessor employer. I here perceive no unusual circumstances dictating a contrary result; consequently, I find and conclude that Respondent's failure and refusal to take over and honor the unexpired collective-bargaining agreement above referred to constituted an unlawful refusal to bargain within the meaning of the Act.

Upon the foregoing factual findings and conclusions, I come to the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Lodge 1096 is a labor organization within the meaning of Section 2(5) of the Act.

3. All fulltime and regular parttime employees in Respondent's service department (for example, mechanics and bodymen and their helpers and apprentices, wash boys, car jockeys, errand boys, and janitors), but excluding sales, parts, and office employees, and further excluding the manager and assistant manager of the service department and of the body shop and all other supervisors within the meaning of the Act, constitute and at all times material herein constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Lodge 1096, on and since November 10, 1969, has been and is the exclusive representative of all

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employees in the aforesaid bargaining unit within the meaning of Section 9(a) of the Act.

5. On and after November 10, 1969, at least until February 8, 1970, there has been in effect a collective-bargaining agreement covering the working conditions of the employees in the aforesaid bargaining unit.

6. On and since November 10, 1969, Lodge 1096 has requested Respondent to recognize and bargain with it over the working conditions of the employees in the aforesaid bargaining unit and to take over the aforesaid collective-bargaining agreement and to honor its terms.

7. On and since November 10, 1969, Respondent has denied and continues to deny Lodge 1096's requests as described in paragraph 6, above.

8. On or about November 10, 1969, Respondent altered certain working conditions of the employees in the aforesaid bargaining unit—the method of computing mechanics' incentive pay per job, the manner of arriving at the guaranteed minimum pay for each hour worked, the number of hours' pay given for Good Friday time off, and the amount of hourly pay to be paid for holiday time off—and, on or about November 15, 1969, Respondent eliminated a portion of the aforesaid bargaining unit by a transfer-out of the body shop, all without notice to or consultation with Lodge 1096.

9. By the conduct described in paragraphs 7 and 8, above, Respondent has refused to bargain and is refusing to bargain collectively with the representative of its employees within the meaning of Section

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8(a)(5) of the Act; and, thereby, has interfered with, coerced, and restrained employees in the exercise of the rights guaranteed them in Section 7 of the Act, in violation of Section 8(a)(1) thereof.

10. The aforesaid acts are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action in order to effectuate the policies of the Act.

I shall recommend, among other things that Respondent be ordered to bargain, upon request, with Lodge 1096 as exclusive representative of the involved employees; upon request, to cancel certain changes in working conditions unilaterally effectuated; [20] and to make restitution to employees for any losses suffered by virtue of Respondent's failure to abide by the involved collective-bargaining agreement or of its in-

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[20] Although I have found that Respondent's transfer-out of the body shop without notice to and consultation with Lodge 1096 constituted an unfair labor practice, under all the circumstances—including the fact that the evidence herein reveals that the body shop employees lost no employment and that their working conditions are currently the subject of collective-bargaining negotiations between Lodge 1096 and their present employer—I do not believe that the effectuation of the purposes of the Act calls for remedial action in this respect.

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stitution of said unilateral changes.[21] (Whatever monetary restitution Respondent's employees may be entitled to shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, and shall include interest in the amount and manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.) And I shall recommend that the order include a provision insuring against a recurrence of the unfair labor practices here found.

Furthemore, since the unfair labor practices committed by Respondent are of a character striking at the roots of employee rights safeguarded by the Act, I shall also recommend that Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case and pursuant to Section 10(c) of the Act, I hereby recommend that the Board issue the following:

ORDER[22]

Bachrodt Chevrolet Co., Freeport, Illinois, its officers, agents, successors, and assigns, shall:

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[21] There is a serious question as to whether employees suffered losses as a result of Respondent's failure to honor the agreement or of its institution of changes in working conditions. The issue was not fully litigated.

[22] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and recommended order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Refusing to recognize and to bargain collectively with Lodge 1096, International Association of Machinists and Aeorspace Workers, AFL-CIO, as the exclusive representative of its employees in a bargaining unit consisting of the fulltime and regular parttime employees in Respondent's service department (for example, mechanics and bodymen and their helpers and apprentices, wash boys, car jockeys, errand boys, and janitors), but excluding sales, parts, and office employees, and further excluding the manager and assistant manager of the service department and of the body shop and all other supervisors within the meaning of the Act.

(b) Refusing to assume the obligations under and to honor the terms of a collective-bargaining agreement originally executed by and between the aforesaid labor organization and Zimmerman Chevrolet, Inc. ("its successors and assigns") and last on or about February 9, 1969.

(c) Making any alterations in the working conditions of the aforesaid employees without notification to and bargaining with said labor organization.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring

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membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, recognize and bargain collectively with said labor organization as the exclusive bargaining representative of the employees in the above-described unit.

(b) Give notice to and bargain with said labor organization before effectuating any future changes in the working conditions of said employees.

(c) Make restitution for any contractual benefits which may have been unlawfully withheld from employees by virtue of its failure to abide by the provisions of the collective-bargaining agreement in effect at the time of its acquisition of the employing enterprise involved herein, in the manner set forth in the portion of this decision entitled "The Remedy."

(d) In the future, honor and abide by the terms of any collective-bargaining agreement between itself and the representative of the employees in the appropriate bargaining unit.

(e) Upon request, cancel certain changes unilaterally made on or about November 10, 1969, in the employment conditions of the employees in said unit—changes with respect to the method of computing mechanics' incentive pay per job, the manner in arriving at the guaranteed minimum pay for each hour worked, the number of hours' pay given for Good Friday time off, and the amount of hourly pay to be paid for holiday time off.

(f) Make restitution for any benefits which may have been lost by virtue of the above unilateral changes in employment conditions, in the manner set forth in the portion of this decision entitled "The Remedy."

(g) Post at its place of business at Freeport, Illinois, copies of the attached notice marked "Appendix." [23] Copies of said notice, on forms provided by the Officer-in-Charge for Subregion 38, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicious places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Officer-in-Charge for Subregion 38, in writing, within 20 days from tre receipt of this Decision what steps have been taken to comply herewith.[24]

Dated at Washington, D.C.

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[23] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall be changed to read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

[24] In the event that this recommended order is adopted by the Board, this provision shall be modified to read: "Notify the Officer-in-Charge for Subregion 38, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

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APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Lodge 1096, International Association of Machinists and Aerospace Workers, AFL-CIO, as the bargaining representative of the fulltime and regular parttime nonsupervisory employees in our service department.

WE WILL NOT make changes in the working conditions of such employees without notice to and consultation with such labor organization.

WE WILL, on request, cancel certain changes in working conditions which we instituted on or about November 10, 1969; and WE WILL pay employees for losses, if any, suffered as a result of our having made the changes.

WE WILL, in the future, honor and abide by the terms of any collective-bargaining agreement with the above labor organization; and WE WILL pay employees for losses, if any, suffered as a result of our withholding of any benefits due under the collective-bargaining agreement in effect when we acquired our operation.

WE WILL NOT, in any manner, interfere with, restrain, or coerce our employees in the exercise of their right to organize; to form, join, or assist a labor organization; to bargain collectively through a bargaining agent chosen by

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themselves; to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any such activities except to the extent that the right to refrain is limited by the lawful enforcement of a lawful union-security clause.

BACHRODT CHEVROLET CO.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 10th Floor, Savings Center Tower, 411 Hamilton Boulevard, Peoria, Illinois 61602, Telephone 309-673-9282.

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APPENDIX H

STATUTES INVOLVED

Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 151 *et seq.* (1964):

"UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

"RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"REPRESENTATIVES AND ELECTIONS

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining

by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-261

BACHRODT CHEVROLET CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals enforcing the Board's supplemental order (Pet. App. 1a-8a) is unreported. Its initial opinion (Pet. App. 21a-40a) is reported at 468 F. 2d 963, and the order of this Court remanding the case (Pet. App. 19a) is reported at 411 U.S. 912. The Board's initial decision and order (Pet. App. 41a-78a) are reported at

186 NLRB 1035, and its supplemental decision and order (Pet. App. 9a-16a) are reported at 205 NLRB 784.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1975. The petition for a writ of certiorari was filed on Monday, August 18, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the successor employer hired a majority of the predecessor's employees and then, after its bargaining obligation to the union had matured, unilaterally changed the employees' working conditions.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 79a-80a.

STATEMENT

In November 1969, petitioner ("Bachrodt") purchased from Zimmerman its automobile dealership (Pet. App. 49a-50a). All of Zimmerman's service department employees had been represented by Lodge 1096, International Association of Machinists and Aerospace Workers, AFL-CIO ("the Union"), with

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which Zimmerman had a collective bargaining agreement (Pet. App. 47a-49a).

Zimmerman's last day of operation was Saturday, November 8 (Pet. App. 52a; O.A. 83).[1] On Thursday, November 6, Zimmerman informed its employees that a change in ownership would take place over the weekend (Pet. App. 52a; O.A. 155). The next day, representatives of Bachrodt distributed job application forms to Zimmerman's employees (Pet. App. 52a; O.A. 155). Every employee in the existing bargaining unit, with the exception of one or two who did not fill out applications, was then interviewed and hired by Bachrodt (Pet. App. 53a, n. 9; O.A. 143-144). Each reported for work when Bachrodt began operations on the following Monday, November 10 (Pet. App. 53a).

On November 7, the Union, on learning of the impending change, notified Bachrodt that the existing agreement between Zimmerman and the Union was effective until February 8, 1970, and therefore would bind Bachrodt (Pet. App. 53a-54a). In a reply dated November 10, Bachrodt stated that it would not be bound by the collective bargaining agreement and would not negotiate with the Union (Pet. App. 55a-56a). On November 12, the Union requested a meeting with Bachrodt to discuss the "existing labor agreement" and also "to negotiate any and all matters pertaining to * * * conditions of employment"

[1] "O.A." references are to the appendix to the briefs in the original proceeding before the court of appeals (No. 71-1354). A copy has been lodged with the Court.

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of its members (Pet. App. 56a-57a). Bachrodt refused to meet with the Union (Pet. App. 57a-58a).

Meanwhile, on November 10, the day it commenced operations, Bachrodt announced and thereafter implemented certain changes in the working conditions that had existed under Zimmerman (Pet. App. 59a).[2] Bachrodt did not notify the Union or consult with it concerning any of the changes (Pet. App. 69a).

In its initial decision the Board found that Bachrodt was a successor to Zimmerman because it continued the business with substantially the same work force. It held that Bachrodt violated Section 8(a)(5) and (1) of the Act by refusing, on and after November 10, 1969, to bargain with the Union as the representative of its employees and by unilaterally changing the employees' work conditions (Pet. App. 42a-43a, 68a-69a); and that Bachrodt further violated its bargaining obligation by refusing to honor the contract between Zimmerman and the Union (Pet. App. 43a, 69a-70a). The Board ordered Bachrodt to bargain with the Union; to honor and abide by the terms of the existing contract; to cancel, upon request, the unilateral changes in working conditions; and to make restitution for any benefits lost because of those unilateral changes (Pet. App. 74a-76a).

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[2] It adopted a new method of computing the wages of service mechanics, increased from two to eight the number of paid hours employees would take off on Good Friday, changed the method of computing hourly pay for holiday time off, eliminated paid vacations, made Saturday morning work mandatory, and ceased to operate the body shop (Pet. App. 59a-61a).

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The court of appeals (with one judge dissenting) enforced the Board's order, finding that Bachrodt committed an unfair labor practice by unilaterally changing working conditions after commencing operations (Pet. App. 31a-32a). The court noted that the changes were not "part of the initial terms of rehiring" (Pet. App. 31a), since Bachrodt "gave assurances to each employee that he would be rehired" (*ibid.*), and the employees were not told of the proposed changes in working conditions on Friday, nor were they instructed to report for work only if prepared to accept any such changes (Pet. App. 32a). Alternatively, the court found that Bachrodt planned to retain all the employees in the unit, and had failed to consult with them before fixing terms (*ibid.*).[3]

On Bachrodt's petition for a writ of certiorari, this Court vacated the judgment of the court of appeals and ordered the case remanded to the Board "for such further proceedings as may be appropriate, in light of *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 * * *" (411 U.S. 912).

On remand, the Board reexamined the evidence in light of *Burns*, and concluded that (Pet. App. 14a):

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[3] The court of appeals declined, however, to enforce that part of the Board's order requiring Bachrodt to honor and abide by the Zimmerman contract, because of this Court's intervening decision in *National Labor Relations Board* v. *Burns International Security Services, Inc.*, 406 U.S. 272, in which it was held that a successor employer is not required to honor the predecessor's collective bargaining agreement (Pet. App. 29a-30a).

> when [Bachrodt] took over the business on November 10, it had completed hiring its work force, which consisted of 22 employees, all of whom had formerly worked for Zimmerman. Under the teaching of *Burns*, [Bachrodt] had a bargaining obligation as a successor to Zimmerman. Its position on that date was akin to that of an employer confronted with a newly selected bargaining representative. It was not free thereafter to establish or change conditions of employment for unit employees without bargaining with the Union [footnote omitted].[4]

The Board reaffirmed the portion of its order requiring Bachrodt to bargain with the Union and to make restitution for any benefits which may have been lost by virtue of the unilateral changes in terms and conditions of employment (Pet. App. 14a).

The court of appeals upheld the Board's evidentiary findings and enforced its order (Pet. App. 1a-8a).

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[4] Alternatively, the Board concluded that (*ibid.*):

> it is apparent that as of November 7 [Bachrodt] planned to "retain all of the employees in the unit" and at such time "it was appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." Indeed, the Union made its first bargaining demand on November 7. Thus, it is clear that [Bachrodt] planned to, and did, retain virtually all of its predecessor's employees in the unit, and that these employees were represented by the Union and constituted a majority of the unit both before and after the transfer of ownership.

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ARGUMENT

In *National Labor Relations Board* v. *Burns International Security Services, Inc.*, 406 U.S. 272, this Court held that a successor employer is not required to adhere to its predecessor's collective bargaining agreement and, in most instances, unilaterally may set initial terms of employment. The court further held, however, that a successor employer has "a duty to bargain" when, and after, it has "selected as its work force the employees of the previous employer to perform the same tasks at the same place they had worked in the past" (406 U.S. at 278), *or*, prior thereto, if it was "perfectly clear [that the successor employer] plans to retain all of the employees in the unit" (*id.* at 294-295).

As the court of appeals found, there was substantial evidence here to support the Board's finding that Bachrodt changed employment conditions *after* it had hired all but two of its predecessor's unit employees and therefore was under an obligation to bargain with the Union. The correctness of this finding raises only an evidentiary issue that does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

Contrary to petitioner's contention (Pet. 8-9, 12 and nn. 6, 7), *Burns* did not establish a new evidentiary standard, requiring that all the Board's findings with regard to a successor employer be supported by "perfectly clear" evidence. That language refers only to the exceptional situation where a successor employer's bargaining obligation attaches before he has ac-

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tually hired a majority of the predecessor's work force. Since there was substantial evidence that Bachrodt changed employment conditions after it hired its predecessor's employees, it is unnecessary to examine whether there was a sufficient basis for the Board's alternative finding that Bachrodt had planned prior to the takeover to retain all the unit employees.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN C. MILLER,
Acting General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

OCTOBER 1975.

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[5] *National Labor Relations Board* v. *Wayne Convalescent Center, Inc.*, 465 F.2d 1039 (C.A. 6), and *Spruce Up Corporation*, 209 NLRB 194, upon which petitioner relies (Pet. 14-15, 18-19 and n. 8), deal with the "perfectly clear" standard and therefore are not in conflict with the holding in the instant case.

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